IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF
THE STATE OF NEW YORK

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York State affirming petitioner's conviction for felony murder and attempted robbery.

OPINIONS BELOW

The opinion of the Appellate Division, Fourth Department, reversing the suppression order of the Monroe County Court is reported at 61 A.D.2d 299, ___ N.Y.S.2d ___ (4th Dept.,1978). The opinion of the Monroe County Court ordering the evidence suppressed is not reported. The opinion of the Court of Appeals of New York State upon remand from the United States Supreme Court is reported at 38 N.Y.2d 812, 382 N.Y.S.2d 40, 345 N.E.2d 583 (1975).

The original granting of the petition for certiorari by the United States Supreme Court is reported at 422 U.S. 1053, 45 L.Ed.2d 705, 95 S.Ct. 2674 (1975). The original decisions of the Appellate Division, Fourth Department, and the Court of Appeals of New York State affirming the judgment of conviction without opinion are reported at 42 A.D.2d 689, 346 N.Y.S.2d 779 (4th Dept.,1973) and 35 N.Y.2d 741, 361 N.Y.S.2d 912, 320 N.E.2d 646 (1974) respectively.

JURISDICTION

The petitioner's conviction was affirmed by the Court of Appeals of New York State, except for the suppression issue,on December 29, 1975. The judgment of conviction became final in all respects when the Court of Appeals dismissed petitioner's application for leave to appeal to the Court of Appeals from the order of the Appellate Division, Fourth Department, reversing the Monroe County Court's suppression order. The petitioner's application for leave to appeal to the Court of Appeals was dismissed on May 10, 1978. Petitioner's motion for reargument on the judgment of conviction was denied on June 13, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. May the State detain a person for custodial questioning on less than probable cause necessary for the traditional arrest.

2. If not, then were the statements and sketches obtained as the exploitation of the illegal arrest or were they so attenuated under the criteria enunciated in Brown v. Illinois, 422 U.S. 590, so as to purge the primary taint of the unlawful arrest.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"The right of the people to be secure in

their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..." Fourth Amendment to the United States Constitution.

"No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law ..." Fifth Amendment to the United States Constitution.

"... nor shall any state deprive any person of life, liberty or property without due process of law..." Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE

The petitioner was convicted by jury trial of felony murder and attempted robbery on April 13, 1972. The charges arose out of an incident where, during the course of an attempted robbery of a pizza parlor by two males, one of the men (not the petitioner) shot and killed the proprietor. The conviction was appealed, one of the grounds being that the incriminating admissions and sketches made by the petitioner should have been suppressed prior to trial by reason of the fact that they were obtained as a result of an illegal arrest without probable cause. The Appellate Division, Fourth Department, at 42 A.D.2d 689 and the Court of Appeals of New York State, at 35 N.Y.2d 741, both affirmed the judgment of conviction without opinion. The United States Supreme Court, at 422 U.S. 1053, granted the petition for the writ of certiorari, vacated the judgment and remanded the case for further consideration in light of the then recent decision in Brown v. Illinois, 422 U.S. 590. Upon remand the Court of Appeals of New York State remitted the case to the Monroe County Court for a factual hearing to determine the following questions:

1. Was there a detention of the defendant by the police?
2. What was the nature of that detention?
3. Was there probable cause for the detention?

4. If there was a detention without probable cause, then was the confession rendered infirm by the illegal arrest under Brown v. Illinois, 422 U.S. 590?

The facts adduced at the hearing showed that the following occurred:

On August 10, 1971, Detective Fantigrossi, chief of the physical crimes squad for the Rochester Police Department, received a call at his home from Detective Mickelson. Mickelson told Fantigrossi that an informant, one O.C. Sparrow, had received information regarding the homicide and attempted robbery which had occurred at the Tower of Pizza on March 26, 1971. Fantigrossi went to police headquarters where he interviewed Sparrow. He had not been acquainted with Sparrow before this time.

Sparrow related the information given to him by one James Cole, who was at that time an inmate of the Monroe County Jail. It appears that Cole had told Sparrow that he (Cole) had committed the crime along with a person named Irving, a/k/a "Axlerod". Sparrow told Fantigrossi he knew who Irving was and picked out the petitioner's picture from the mug files.

Since Cole was in custody at the Monroe County Jail on an unrelated charge, Fantigrossi was able to interview Cole personally. After two hours of questioning, Cole finally admitted that he had no part in the crime. Cole then told Fantigrossi that one Hubert Adams, an individual with whom Cole had been incarcerated at the Monroe County Jail, had stated to Cole that Hubert Adams' brother, a/k/a "Ba Ba", had committed the crime and that an individual named Irving was also involved. This conversation between Cole and Hubert Adams took place approximately two months before Cole was questioned by Fantigrossi. On August 10, 1971, when Fantigrossi questioned Cole, Hubert Adams was incarcerated at Elmira Correctional Facility, Elmira, New York.

Fantigrossi then issued order to pick the petitioner up and bring him in. Fantigrossi testified at the hearing that he wanted the petitioner brought in to police headquarters so that he could be interrogated regarding the homicide.

He admitted further that he knew at the time he issued the order that he did not have enough information to obtain a warrant.

On the morning of August 11, 1971, at approximately 8:00 A.M., Detective Mickelson and two other detectives, Ruvio and Luciano went to the petitioner's home. They were wearing plain clothes and arrived in an unmarked car. They had been to the Dunaway residence several times the preceeding night and the remainder of the night they spent combing the west side of Rochester for the petitioner.

When they arrived at petitioner's home, Mickelson and Ruvio went to the door where they were met by petitioner's mother. They entered and searched through the rooms of the house. Luciano remained outside in the driveway where he could observe anyone attempting to escape from a side window or door. He observed a young woman exit the side door, walk down the street, turn the corner and enter the third house from the corner.

When Mickelson came out of the petitioner's residence, he and Luciano walked down to the house that the young woman was seen entering. The petitioner came to the door and Mickelson said "Axlerod Dunaway". The petitioner's testimony was that one of the detectives grabbed him, but neither of the detectives recalled touching him. The petitioner asked the detectives repeatedly why he had to go downtown, but was only told he would find out when they arrived there.

The petitioner was taken to police headquarters where, shortly

after his arrival, he was turned over to Detective Novitsky for interrogation. According to police testimony he was given his Miranda warnings and immediately thereafter he admitted his implication in the crime and drew two sketches at Detective Novitsky's behest.

At the time of the arrest the petitioner was an eighteen year old who had gone as far as the tenth grade. He was approximately 5'7" tall and weighed about 130 lbs. Detective Mickelson was approximately 6'3" tall and weighed 203 lbs. Detective Luciano was taller and heavier than Mickelson. Both of the detectives testified that they were armed and both were prepared to use force to effect the arrest if necessary.

On March 11, 1977, the Monroe County Court (J. Mark) rendered a decision finding that the petitioner did not voluntarily accompany the detectives to the police station, that there was no probable cause for the arrest, that there was no claim or showing by the People that the statements and sketches were attenuated so as to purge the taint of the illegal arrest, and that they should have been suppressed prior to trial. The Appellate Division reversed this determination and the Court of Appeals of New York State dismissed the application for further appeal for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

I.

This case squarely addresses the question of whether the State may detain an individual for custodial questioning on less than probable cause required for a traditional arrest, a question which the Court has already conceded is of manifest importance. Morales v. New York, 396 U.S. 102, 24 L.Ed.2d 299, 90 S.Ct. 291 (1969). In People v. Morales, 42 N.Y.2d 129, 397 N.Y.S.2d 587, 366 N.E.2d 248 (1977), the New York Court of Appeals, upon remand

from this Court, reaffirmed its earlier holding that, lacking probable cause, law enforcement officials may detain an individual upon a reasonable suspicion for custodial questioning for a reasonable and brief period of time under carefully controlled conditions sufficient to protect his Fifth and Sixth Amendment rights. see People v. Morales, 22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307 (1968). This holding of New York State's highest court is in direct conflict with this Court's previous decisions and virtually emasculates the protections provided by the Fourth Amendment for the citizens of New York State.

In the area of the Fourth Amendment freedom from unreasonable search and seizure, whether the seizure be of property or of the individual, the touchstone of this Court in its decisions has always been probable cause. Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975); Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1974); Cupp v. Murphy, 412 U.S. 291, 36 L.Ed.2d 90, 93 S.Ct. 2000 (1973); Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969); Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964); Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963); Henry v. United States, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959); Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959); Brinegar v. United States, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949); Carrol v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925).

This case does not involve the limited intrusion upon reasonable suspicion by law enforcement officers in a typical street encounter, Adams v. Williams, 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972); Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88

S.Ct. 1868 (1968). On the contrary, this case involves a full-blown seizure of the petitioner's person, whether it be termed an arrest or an investigative detention. see Davis v. Mississippi, 394 U.S. 721,726,727, 22 L.Ed.2d 676,680,681, 89 S.Ct. 1394,1397 (1969). The seizure was made upon information so scant and so unreliable that, at best, it was mere rumor. cf. Draper v. United States, supra; see also Spinelli v. United States, 394 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1946).

It is the petitioner's contention that the police conduct in this case is exactly the same type of conduct which the exclusionary rule under the Fourth Amendment was designed to protect the citizenry against. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961). This type of detention, in many instances, may be more invidious than a formal arrest where the suspect is apprised of what he is being charged with at the outset. This Court should review the validity of the investigative detention sanctioned by the New York Court of Appeals in People v. Morales, supra, in light of the right to be free from unreasonable seizures under the Fourth Amendment.

II.

This case also offers this Court the opportunity to clarify the criteria set forth in Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975), to be used in determining whether a statement following an illegal arrest is obtained by exploitation of the illegal arrest or rather that the statement is so attenuated that it has been purged of the primary taint.

The trial court found that the People made "no claim or showing... of any attenuation of the defendant's illegal detention" ... (see J. Mark's opinion appended hereto). In reversing the trial

court, the Appellate Division, Fourth Department, in a three-judge majority opinion found that there was sufficient attenuation of primary taint due to the fact that the defendant had testified that he was never threatened or abused by the police, and that he was given his Miranda warnings. People v. Dunaway, 61 A.D.2d 299,303 (1978). The majority opinion does not give weight to the fact that the statement was made almost immediately upon the petitioner's arrival at the police station, that there were absolutely no intervening circumstances between the arrest and the statement, and that the police, upon information no better than a rumor and knowing they did not have enough information to obtain a warrant, seized the petitioner for the purpose of questioning him incommunicado at the police station regarding the homicide. Both the concurring opinion (J. Denman) and the dissent (J. Cardamone) agreed that the attenuation was insufficient if the initial seizure was illegal. The facts in the case at bar "are almost on point with those in Brown." (People v. Dunaway, supra, J. Cardamone dissenting).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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ALL OF THE ABOVE D CUMENTS
APPEAR IN THE PRINTED APPENDIX
VOLUME AND HAVE NOT BEEN
REPRODUCED HERE.

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-5066

IRVING JEROME DUNAWAY,
Petitioner,

—*vs.*—

STATE OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JULY 14, 1978
CERTIORARI GRANTED NOVEMBER 27, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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RELEVANT DOCKET ENTRIES

1. Order of Appellate Division, Fourth Department affirming defendant's judgment of conviction without opinion (June 29, 1973)
2. Order of the New York State Court of Appeals affirming defendant's conviction without opinion (October 23, 1974)
3. Defendant's petition for certiorari filed with Supreme Court (January 25, 1975)
4. Order of the United States Supreme Court granting defendant's motion for leave to proceed *in forma pauperis* and for certiorari which remanded this case to the New York Court of Appeals (June 30, 1975)
5. Order of the New York Court of Appeals remanding this case to the Monroe County Court for further proceedings (December 29, 1975)
6. Decision and order of the Monroe County Court suppressing defendant's confession as being obtained in violation of his Fourth Amendment Rights (March 11, 1977)
7. Order of the Appellate Division, Fourth Department reversing the order of the Monroe County Court (March 1, 1978)
8. Order of the Appellate Division, Fourth Department denying defendant's motion to reargue the appeal (April 7, 1978)
9. Certificate of the New York State Court of Appeals dismissing defendant's application for leave to appeal (May 10, 1978)
10. Order of the New York State Court of Appeals denying defendant's motion to reargue the application for leave to appeal (June 13, 1978)
11. Defendant's petition for certiorari filed with Supreme Court (July 14, 1978)
12. Order of the United States Supreme Court granting defendant's motion for leave to proceed *in forma pauperis* and for certiorari (November 27, 1978)

STATE OF NEW YORK
COUNTY COURT
COUNTY OF MONROE

Indictment No. 458

THE PEOPLE OF THE STATE OF NEW YORK

—*vs.*—

IRVING JEROME DUNAWAY AND THOMAS JAMES MOSLEY

ORDER

The above named defendant, Irving Jerome Dunaway, having brought the following motions: (a) a motion for Discovery and Inspection pursuant to CPL Section 240.10 et seq. asking to discover and inspect any statement made by him, and also any reports, documents, examinations, made in connection with the case, and any photographs made at the scene; and (b) a motion to disclose any evidence favorable to the accused under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83, and (c) a motion for a bill of particulars pursuant to CPL Section 200.90; and (d) a motion to suppress any statement made by him pursuant to Section 710.20 (3) of the CPL; and (e) a motion to suppress tangible evidence pursuant to Section 710.20(1) and (f) also to suppress any identification evidence pursuant to Section 710.20(5), and said motions coming on to be heard on the 11th day of November, 1971, Charles F. Crimi, Esq., appearing on behalf of the defendant Dunaway, and Jack B. Lazarus, District Attorney of Monroe County, Eugene Bergin, Esq., of counsel, appearing for the People of the State of New York and it further appearing that the People of the State of New York, have complied with the demands of the defendant as to the (a) motion for discovery and in-

spection, and the People having represented to the Court that they are not in possession of any evidence favorable to the accused as to the motion (b) to discover such evidence, and the People having complied with the demands for particulars as to the motion (c) for bills of particulars and it appearing further that the People do not intend to offer into evidence any physical, tangible evidence as sought to be suppressed by (e) the motion to suppress pursuant to Section 710.20(1), and the People further do not intend to offer any identification evidence as sought to be suppressed by (f) the motion to suppress pursuant to Sec. 710.20(5); and it further appearing therefore that the sole remaining motion be the motion (d) to hold a hearing and to suppress any statement made by the defendant Dunaway pursuant to Section 710.20(3) of the CPL, now on motion of Charles F. Crimi, Esq., attorney for Defendant Dunaway, it is hereby

ORDERED, that a hearing be held prior to the trial, to determine the admissibility of any statement, written or oral, made by the defendant Dunaway, pursuant to Section 710.60(4).

December 9, 1971

/s/ George D. Ogden
GEORGE D. OGDEN
County Court Judge

Filed Apr. 20, 1973

STATE OF NEW YORK
COUNTY COURT
COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

—*vs.*—

IRVING JEROME DUNAWAY, THOMAS JAMES MOSLEY,
DEFENDANTS

HALL OF JUSTICE, ROCHESTER, NEW YORK

Presiding: HONORABLE GEORGE D. OGDEN,
Monroe County Court Judge.

TRANSCRIPT OF PROCEEDINGS OF HUNTLEY HEARING AND TRIAL—February 24, 1972

* * * *

[3] (February 24, 1972—10:51 A.M.—Court convened—Defendants present and by counsel.)

MR. BERGIN: May it please the Court, the People move for trial in the case of the People of the State of New York versus Irving Jerome Dunaway and Thomas James Mosley, Indictment No. 458, filed August 26, 1971.

MR. DONOVAN: The Defendant Mosley is ready, Your Honor.

MR. CRIMI: The Defendant Dunaway is ready.

THE COURT: Are both defendants to be tried together in the one action?

MR. DONOVAN: Yes, Your Honor.

THE COURT: Mr. Crimi?

MR. CRIMI: As far as Dunaway is concerned, Your Honor, it is my understanding that there is no statement going to be used. If there is a statement of the co-

defendant Mr. Mosley, and at the present time it does not appear that I do have any grounds for a separate trial.

THE COURT: All right. Are you ready, Mr. Donovan?

[4] MR. DONOVAN: I am ready, Your Honor.

THE COURT: Mr. Crimi?

MR. CRIMI: Yes, Your Honor.

MR. BERGIN: The People are ready.

Your Honor, the People do intend to offer at this trial a statement and/or admission made by the Defendant Dunaway, and we are ready to proceed with a Hearing, if the Court orders such.

I would like to say at this time, Your Honor, that the Defendant Thomas James Mosely did make a statement to the police upon his arrest, a stenographic statement which I have given a copy to Mr. Donovan. It is not our intention to use the statement in the trial in chief of the prosecution, Your Honor.

MR. DONOVAN: I, therefore, have no desire for any Huntley Hearing on the part of the Defendant Mosely.

MR. CRIMI: Well, at the present time, Your Honor, if the District Attorney represents that the statement of the co-defendant is not going to be used I still think that I am [5] entitled to a severance.

THE COURT: Do you want a Huntley Hearing?

MR. CRIMI: Yes. I had moved for a Huntley Hearing and one had been ordered, Your Honor.

THE COURT: All right.

MR. BERGIN: The People are ready. While we are on the statements I might just say for the record that I have given to Mr. Crimi a copy of the stenographic statements made by his client and also a copy of the statement made by the Defendant Mosley, and I have also provided Mr. Donovan with copies. Is that right?

MR. DONOVAN: Acknowledged.

MR. CRIMI: Yes.

THE COURT: All right.

* * * *

[30] FRANCIS NOVITSKEY, Detective with the Rochester Police Bureau, called herein as a witness on behalf of the People of the State of New York, having first been duly sworn, was examined and testified as follows:

[31] DIRECT-EXAMINATION

BY MR. BERGIN:

Q. You are with the Rochester Police Bureau?
A. Yes, I am.
Q. What is your position there, sir?
A. Detective, Physical Crimes Squad.
Q. How long have you been with the Police Bureau?
A. Twenty years.
Q. Now, Detective, on the morning of August 11, 1971, did there come a time while you were there at the Public Safety Building and that you had occasion to see the Defendant Jerome Irving Dunaway?
A. Yes, I did.
Q. That is Irving Jerome Dunaway?
A. Yes.
Q. Could you tell the Court what time it was that you first saw Mr. Dunaway?
A. It was about 9:00 A.M. on the 11th of August.
Q. Was he brought into the Bureau by some officers?
A. Yes, he was.
Q. Can you tell us what transpired after you first saw Dunaway; what happened, please?
A. Well, I advised him of his constitutional rights. He waived same.
[32] Q. Now, what—
MR. CRIMI: I object to the conclusions of the answers here.
THE COURT: Sustained.
Q. Was this in a certain office in the Detective Bureau?
A. Yes, it was in an interview room.
Q. Just how did you go about advising the defendant of his constitutional rights?

A. I advised him verbally that he had a right to remain silent; that he did not have to answer any questions if he did not wish to; that anything he did say would be used against him in a Court of Law. He had a right to consult with an attorney before answering any questions; to have an attorney present with him during the questioning by us if he so desired; if he could not afford an attorney, one would be provided for him; if he did consent and agree to discuss this matter without an attorney present he could terminate the discussion at any time. I asked him if he understood these rights. He stated he did. I asked him if he agreed to waive these rights and consent to discuss the matter with me, and he stated he would.
Q. Did you use one of these police waiver cards, detective?
[33] A. Yes.
Q. Do you have that present with you?
A. Yes, I do.
MR. BERGIN: Would you mark this, please?

(Whereupon People's Exhibit No. 1 was marked for identification: a notification and waiver card.)

Q. Detective, I show you a card marked Exhibit 1 for identification, and ask you what this is?
A. This is the notification and waiver card.
Q. Did you have occasion to use this particular card in the morning of August 11th?
A. Yes, I did.
Q. Is there some writing on the back of that card?
A. Yes, there is.
Q. Would you tell us what that is?
A. It has the date, 8-11-71; time, 9:30 A.M.; place, Room 478, Public Safety Building; person interviewed, Irving Dunaway; persons interviewing, I signed it myself, Novitskey, and Detective Sal Ruvio also signed it.
Q. Do you recall, detective, if you read this card to the defendant Dunaway or if you gave him the rights as you did here from your own memory of these?
[34] A. I gave it to him as I did here. I had the card right there with me.

Q. You get to know these after a while?
A. Certainly do.
Q. I understand this card is being revised now?
A. It's to be revised, yes.
Q. But, Mr. Dunaway did say that he understood what you told him?
A. Yes, he did.
Q. He said he would discuss this with you without a lawyer?
A. Yes, he did.
Q. Could you tell us what was said after that took place?
A. Well, he stated that he and another youth—
Q. Did you ask him questions or—
A. Yes, I did. I asked him about the homicide at the pizza parlor on Genesee Street. I asked if he knew anything about it. He stated he did. He told me that he was there when it happened. He stated that they were going to the bridal shop first. They changed their mind, walked away to the pool room again. They later returned to the bridal shop. It was closed. They looked over the pizza shop. He knew the name of it, the Tower of Pizza. He said there was someone [35] coming out of the pizza shop and someone was walking up the street. They waited until these people cleared away, and at this time he and his accomplice entered the store, the accomplice having the gun, a sawed off shotgun. He described it as a double barrel, double triggers. Upon entering the store there was a white woman behind the counter who headed toward the swinging doors to the rear of the store, and stated something to the effect that he has a gun. On this, a man came out from the back room through these swinging doors, and he was headed toward the cash register at the time.
Q. Who was?
A. Mr. Dunaway, over there.
Q. And he—
A. And he heard the gun go off. He wanted to run out of the store. He fell up against the door, and injuring his ear. He ran down Clifton Street up Epworth Street, Lennox Street to an aunt's house where he had

his ear treated. He told his aunt he had a fight with his girlfriend and she bit him. Then, he changed his story and says that the girlfriend cut his ear with a can opener. He didn't know where his accomplice went at this time. This was—
[36] Q. Was this in substance what he told you?
A. On the morning of the 11th, yes.
Q. Did there come a time when you called for a police stenographer to normally take this down?
A. Yes, I did.
Q. Do you know about what time this was?
A. That was about 10:20 A.M. on the 11th.
Q. Who was the police stenographer?
A. Sam Shadoff, on this one.
MR. BERGIN: Would you mark this, please?

(Whereupon People's Exhibit No. 2 was marked for identification: a statement.)

Q. Detective, will you tell us, after Mr. Shadoff arrived, what transpired; what did he do, what happened?
A. I had him identify himself as to age, name.
Q. Well, did you take a statement of him in the presence of Mr. Shadoff?
A. Yes, I did.
Q. Who was present at that time?
A. Well, it was Mr. Dunaway, myself and San Shadoff in the beginning.
Q. Did any other officers ask this defendant any questions?
A. Yes. Later on in the statement Detective-Lieutenant [37] Fantigrossi came in and asked him questions.
Q. All right. Do you recall about how long this took, to take this formal statement?
A. I'd have to say twenty minutes. I would just have to guess.
Q. All right. Detective, I show you People's Exhibit No. 2 marked for identification, and ask you if you will look at it?
A. Yes.

Q. You have had occasion to read this transcript over in preparation for this trial, Detective?

A. Yes, I did.

Q. Is this transcript I hand you now, is this the transcript of what was said by you and Mr. Dunaway that morning?

A. Yes, it was.

Q. Can you tell us now what time it was that this formal transcript ended?

A. Yes. It ended at 10:45 A.M.

Q. After 10:45 A.M. what happened?

A. Well, after 10:45 the blotters were made out and he was put in detention.

Q. Now, you have related to us the statement that he gave [38] to you orally before you called a stenographer in?

A. Yes.

Q. When the stenographer was present, did you go over the same material with him?

A. Yes.

Q. Is this, in sum or substance, the same as he said in front of the stenographer?

A. Yes.

Q. So, then, on that morning you did not see him after 10:45 A.M.?

A. Not on that morning, no.

Q. Did there come a time later on at any time when you had occasion to see Mr. Dunaway again?

A. Yes. It was the evening, around ten o'clock, on the 11th of August.

Q. Will you tell the Court what happened; what the reason for seeing him on that occasion was?

A. Called back into the building because Mr. Dunaway wanted to talk to myself and my partner. I went down to the cell block and put him in one of the smaller interview rooms there, and he told us that he wanted to come clean and tell the whole truth on it. So, I told him, "You have already been advised of your rights. [39] You remember those rights?" He says, "Yes." He says he knows them. He then gave us a verbal statement that he, Ronald Adams were over at 69 Lennox Street in a

girlfriend's house, and they discussed getting some money some place. They didn't know exactly where, yet, or anything. Ronald had the gun. They left the house. They walked over to the bridal shop on Genesee Street. They returned back to 69 Lennox Street, and they asked TJ Mosley to drive them down to Genesee Street, at which time Mr. Mosley did drive them, and Mr. Mosley parked at the Sportmen's Grill. He didn't know the name of the grill. He said the bar at the corner of Clifton and Genesee.

Q. Clifton?

A. Clifton and Genesee. Himself and Ronald got out of the car. They went back to the bridal shop. It was closed. Then, they went into the Tower of Pizza, and there it's just about the same thing.

Q. Did he relate again to you as to what happened inside?

A. Just about the same. Yes, went inside—he related about something—he stated when he left the store, he stated again he fell and injured his ear. They ran back to the car, which was still parked back there, got [40] into the car and were driven up to Atlantic Street where he then got off at his aunt's house.

Q. Now, this was a verbal statement he made to you in the detention area that evening of the 11th?

A. That's right.

Q. Was there anyone else present at that time?

A. Detective Dominick.

Q. What did you do after he told you that?

A. We told him we would see him again in the morning and discuss it further. We then left there and went in search of Adams and Mr. Mosley.

Q. You did not take a stenographic statement that evening?

A. No, I did not.

Q. Did there come a time when you did have that verbal statement taken stenographically?

A. Yes, we did.

Q. When was that?

A. That was the morning of the 12th, about 7:40 A.M.

Q. How was that done?

A. Well, we brought him back up in the interview room. At this time we had Paul Messina, Stenographer, come up and take it; and in sum and substance he told me the same thing he said the previous night.

[41] Q. This was in the presence of a stenographer Paul Messina?

A. That's right; yes.

MR. BERGIN: Would you mark this, please?

(Whereupon People's Exhibit No. 3 was marked for identification: a statement.)

MR. BERGIN: Would you mark these two pages also, please?

(Whereupon People's Exhibit No. 4 was marked for identification: two pages of sketches.)

Q. Detective, I show you Exhibit No. 4 marked for identification, two pages of sketches of some sort. I hand you those and ask you what they are?

A. Yes. These are drawings made by Mr. Dunaway as to the location of the crime, and the drawing is the interior of the pizza place.

Q. These were made by Mr. Dunaway in your presence?

A. Yes, they were.

Q. When were they made?

A. They were made the morning of the 11th of August.

Q. That is the morning when you had the first conversation with him?

A. That's true.

Q. Can you tell us was there any conversation about the [42] drawing of the sketches or how did it come about?

A. Yes. Have him describe the inside of the house, as to the location of the woman and Adams, and also the swinging doors in the back. This door and the cash register, as to his statement.

Q. Well, did you ask him to draw it out, or did he say he would draw it, or what happned?

A. No. I asked him if he could draw it, and he stated he would.

Q. He said he would?

A. Yes.

Q. And this is what he drew?

A. Yes.

Q. Now, there are two pages. Can you identify the first one with the Exhibit mark on it; what is that page, the first page?

A. Well, this is a drawing showing how—the direction he took after leaving the pizza place there down on Clifton, up Epworth to Atlantic Street. At this time he stated he was on foot, and he ran all this distance.

Q. This is a sketch that he drew?

A. That's right.

Q. And the second page is what, sir?

[43] A. It's a description, his drawing describing the interior of the pizza place.

Q. All right.

A. And it also describes—

Q. On the first page is there a gun there?

A. Yes. He made a drawing here of the gun, resembling the gun that was used.

Q. I hand you Exhibit No. 3 for identification, and ask you if you recognize this?

A. Yes.

Q. Do you recognize that transcript, detective?

A. Yes.

Q. What is that a transcript of?

A. This is a transcript that was taken on the morning of the 12th, by Paul Messina, the stenographer.

Q. You have had a chance to read this over?

A. Yes, I did.

Q. Does this contain stenographically what he told you verbally the night before in the detention area?

A. Yes.

Q. On the times, would you tell us what time this stenographic statement started?

A. It started at 7:41 A.M. on the 12th.

[44] Q. How long did it take? When did it end?

A. It ended at 8:06.

Q. After 8:06, did you have anything further to do with Mr. Dunaway; any further conversation with him?

A. No. We then returned him back to the cell block.

Q. So, have you related, sir, everything this defendant has told you about the occurrence of this crime?

A. He did state—I don't remember just when it was, but he did state he wanted to give himself up shortly after the crime was committed, but he was threatened that if he did so—he was threatened about bodily harm.

Q. When was this, detective?

A. I don't recall whether it was the night in the cell block or the return to his cell block after the second statement. I just don't recall when it was.

Q. Now, during your interviews with this defendant, and they consisted of three; is that correct?

A. Yes.

Q. Did you or any other officers physically abuse the defendant in any way?

A. None whatsoever.

Q. Was there any force or pressure, coercive means used at [45] all by you or any other members of the Police Bureau?

A. No, there wasn't.

Q. Detective, would you identify here in court the person that you called Mr. Dunaway, if you do see him here?

A. Yes. He's sitting here with the gray double breasted suit on at the table there.

Q. Can you tell us where he is in relationship to Mr. Crimi?

A. Yes. He's to Mr. Crimi's immediate left.

Q. Mr. Crimi's left?

A. Yes.

Q. Or right?

A. I'm sorry; right.

MR. BERGIN: Thank you, detective. You may ask.

CROSS-EXAMINATION

BY MR. CRIMI:

Q. Detective Novitskey, I believe you stated that Sam Shadoff came and took a statement at about 10:20 on August 11, 1971; is that correct?

A. Yes, I did.

Q. How long before 10:20 had you called for Sam Shadoff?

A. I don't remember. I have no idea.

Q. Was he on duty in the building that day?

A. He should have been, yes.

[46] Q. I think you said that it was approximately nine o'clock in the morning, that same morning, that Irving Dunaway was brought to you; isn't that correct?

A. Yes.

Q. So, that you had occasion to speak to him from approximately nine o'clock until 10:20, 10:15; is that correct?

A. That's correct.

Q. So, that your conversation with him then lasted for that length of time; is that correct?

A. That's correct.

Q. Now, I want to show you People's Exhibit No. 1. You tell me this was the waiver card that the Police Department uses; is that correct?

A. That's correct, sir.

Q. Now, is there anything on that card, on either side thereof, that is in the handwriting of Irving Dunaway?

A. No, there isn't.

Q. That card—whose handwriting is it on that card?

A. Mine and Sal Ruvio's signature, and also there's a notation here by Detective Dominick.

Q. Is there anything on that card that states the time that you read those—the card to Mr. Dunaway?

A. Yes, there is.

[47] Q. All right. But, that was written in; is that correct?

A. That's right.

Q. Is that your handwriting of the time?
A. That's right.
Q. I notice here it has a note, 7:40 A.M. 8-12, in pencil. What does that mean?
A. Detective Dominick put that note on there on the 12th of August, when we proceeded to take another statement from him.
Q. Now, it is your testimony that at 9:00 A.M. on 8-11-71, you read what was on this card to Irving Dunaway?
A. I give it to him verbally, but I had the rights with me present.
Q. Did you read the card?
A. No, I didn't.
Q. Oh, you did not read from the card?
A. No, I didn't.
Q. So, on the card, where it says, "Do you understand what I have just told you," and it says response, "Yes," that is your handwriting?
A. Yes.
Q. But, as a practical matter, that particular question does not answer what is on this card, but what you told [48] him verbally; is that correct?
A. Which is verbatim with the card.
Q. Which is verbatim with the card?
A. Yes.
Q. You have got this memorized, have you?
A. Oh, yes.
Q. All right. Would you please tell me now what this card says?
A. That you have a right to remain silent.
Q. Well, no, you had it memorized?
A. Yes.
Q. Well, then, read it to me verbatim?
A. "I am now advising you that you have a right to "—
THE COURT: You do not mean to read it, do you?
MR. BERGIN: I object.
Q. I am sorry, give it to me—
A. I am now advising you that you have a right—

MR. BERGIN: I object, Your Honor. The witness has testified what he advised the defendant in his direct-examination. I object to his being asked whether he memorized that card verbatim and to give it back to him verbatim. What is an issue is actually what the defendant [49] was told.
THE COURT: There is no question that is an issue, but this may have some effect upon the credibility of the witness. Overruled.
A. I am now advising you that you have a right to remain silent. You do not have to answer any questions if you do not want to; that anything you do say would be used against you in a court of law; that you have a right to consult with an attorney before answering any questions and to have an attorney present with you during the questioning by me if you so desire. If you can't afford an attorney, one will be provided for you. If you do consent and agree to discuss this matter without an attorney present, you can terminate the discussion at any time. I then asked him—
Q. All right. Is that the exact speed at which you were—
A. No, definitely not.
Q. You were slower?
A. Yes.
THE COURT: Is that what is on the card, Mr. Crimi?
MR. CRIMI: Basically it is, yes, Your Honor. There are some small variations.
[50] Q. All right. Now, Detective Novitskey, you have been on the force for twenty years; is that correct?
A. Yes, sir.
Q. And I have assumed you have used, since at least 1964 or so, these cards; isn't that correct?
A. Whenever they came out, yes.
Q. Whenever they came out. I will pick '64.
A. Yes.
Q. Now, haven't you had occasions where you have had defendants initial the card?
A. I have, but very seldom.

Q. But, at any rate you did not ask Mr. Dunaway to initial this card?

A. No, I did not.

Q. Did you do anything other than tell him what these—tell him about these rights to an attorney; did you attempt to explain anything on the card?

A. No. I asked him if he knew what the rights meant. He stated he did.

Q. That is the only question you asked him, "Do you know what they mean," and he said, "Yes."

A. I asked him then if he would agree to waive the rights and consent to discuss the matter with us, and he [51] stated yes.

Q. Did you try to explain what waive meant or agreed meant?

A. No, I did not.

Q. Then, after you did that, then, you began talking to him, I take it?

A. That's right.

Q. You had not talked to him about the crime prior to that, had you, prior to the rights?

A. No.

Q. Now, this was August 11, 1971, and the crime took place in March of that year; is that correct?

A. That's true.

Q. Did you find, in talking to him, that he was vague as to dates and times and places?

A. Yes, he did not know the date.

Q. Did you do anything to refresh his recollection?

A. Well, I asked him if he remembered what month. He says it was in March. I asked him what day. He says a Friday. I asked him which Friday. He says the last Friday in March. That was about the extent of the date.

Q. Well, did you give him any kind of a synopsis prior to questioning him to refresh his recollection as to what you were after and what you were going to discuss about [52] it, or did you immediately start asking him questions?

A. No. I asked him about—well, I told him we were going to talk about the murder at the Genesee Pizza

Shop, and I asked him if he knew anything about it. He said yes. Then, he was advised, and we went to it from there.

Q. Well, I take it from what you have just said now, that you advised him after he said yes?

A. Yes.

Q. So, that there was a sentence or two prior to the advisement of the conversation; is that correct?

A. Well, yes. We have to let him know we are going to talk about it, so he can know whether to waive his rights.

Q. Well, I just wanted to make one thing clear, that the first thing you did was not advised him of his rights; you talked to him and you told him that you wanted to talk to him about the pizza parlor murder and did he know anything about it, and he said yes, and then you advised him of his rights?

A. That's correct.

Q. Now, Exhibit 4 is apparently two diagrams. Can you tell us approximately when these were drawn; in the beginning [53] of the conversation that you had or toward the end?

A. It was during the conversation before the statement was taken.

Q. This occurred during the oral conversation?

A. Yes.

Q. Were you having some difficulty understanding what Dunaway was saying; that he tried to clear it up by diagram or what?

A. Well, yes. After I said something to myself—when he told me he hit the pizza place and ran down a certain street—but, the other streets I'm not too familiar with them—and he drove up this—

Q. You weren't familiar?

A. Not with some of them, Atlantic and some others.

Q. Now, after the first stenographic statement was concluded, I take it you testified he was booked and that he was put in a cell; is that right?

A. Yes.

Q. In the detention area?

A. Right.

Q. You say then that ten or eleven o'clock that very night, that you got a message that he wanted to talk to you?

A. That's true, yes.

[54] Q. And you went up there and saw him at that time?

A. Yes.

Q. Did you readvise him of his rights at that time?

A. At that time I told him—well, I asked him, "Do you remember your rights, what I read to you this morning?" He said, "Yes." And he says he wanted to clear up his story; he wanted to tell the truth.

Q. All right. How long did that oral conversation take place?

A. It wasn't—I'll have to guess, but it was a very short time; five to ten minutes.

Q. Then, you came back in the morning with a different stenographer Mr. Messina; is that correct?

A. Yes.

Q. Did you make any notes concerning this transaction?

A. I made a supplement—my partner made a supplement out.

Q. Do you have that with you?

A. No, I do not.

MR. CRIMI: Do you have that, Mr. Bergin?

MR. BERGIN: Detective Dominick's report?

MR. CRIMI: Well, he did not make a report at all.

THE WITNESS: No, my partner made it.

[55] MR. CRIMI: Are you going to call Detective Dominick to the stand?

MR. BERGIN: Yes.

Q. Did you testify before the Grand Jury?

A. I don't remember.

MR. BERGIN: I think he did. Yes, Detective Novitskey did testify before the Grand Jury.

MR. CRIMI: May I have a moment, Your Honor, please?

THE COURT: Yes.

(Whereupon Mr. Crimi had a moment.)

Q. I am going back to Exhibit 1. Was this made in the presence of Mr. Dunaway, written out, handwritten?

A. Yes. Well, I was stating his rights and I was filling in, yes.

Q. So, he was in a position to see you writing this out?

A. Yes.

MR. CRIMI: I have no further questions.

MR. DONOVAN: No questions, Your Honor.

MR. BERGIN: I have no further questions.

THE COURT: Thank you, detective. You may step down.

(Witness excused.)

[56] MR. BERGIN: The People call Detective Dominick.

JOSEPH DOMINICK, Detective with the Rochester Police Bureau, called herein as a witness on behalf of the People of the State of New York, having first been duly sworn was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. BERGIN:

Q. Detective, you are with the Rochester Police Bureau?

A. Yes, sir.

Q. You work with Detective Frank Novitskey on many cases?

A. Yes, sir.

Q. Did there come a time last summer, the month of August, when you had occasion to see the Defendant Irving Jerome Dunaway?

A. Yes, sir.

Q. Can you tell the Court when it was that you first came in contact with Mr. Dunaway?

A. It would be on August 11, 1971, at approximately 9:00 A.M.

Q. Where was that?

A. At the Public Safety Building, sir.

Q. Can you tell us what happened at that time?
A. He was under arrest at the time, sir, and I recall that [57] my partner, Frank Novitskey, was at the Public Safety Building and did question him that morning.
Q. Were you in on any of the interviewing at that time?
A. Not that day, no, sir.
Q. Were you present later on? We understand that Mr. Dunaway called and was seen again later that night. Were you present with Detective Novitskey, then?
A. Yes, sir.
Q. Can you tell us how that came about and what your recollection is as to what happened that evening?
A. Well, it was about 10:00 P.M. on August 11, 1971. We received word that Irving Dunaway was in custody at that time and wanted to talk to some detectives. I recall that my partner Frank Novitskey and I did go to the cell block to talk to Mr. Dunaway. He stated that he had lied about a statement that he had made to Detective Novitskey, and he wanted to clear some matters up.
Q. Do you recall what he said at this time?
A. I recall that he mentioned he had lied about it, and that there was also a third party involved by the name of TJ Mosley. We talked to him for a short time, and then we went about our way attempting to locate Mr. Mosley and one Ronald Adams.
[58] Q. Did there come a time when you reduced this conversation to a stenographic transcript?
A. Yes, sir.
Q. When did that happen?
A. About 7:40 A.M. on August 12, 1971. That was in the Public Safety Building.
Q. That was the next morning after you talked with Dunaway?
A. The morning after, yes, sir.
Q. Who questioned Mr. Dunaway at that time?
A. Detective Novitskey, sir.
Q. Do you recall at this time what Mr. Dunaway said on that morning of the 12th?

A. He stated that he was at home on Lennox Street. I believe it was 69 Lennox Street, on Friday, the 26th of March, 1971. He was with a fellow he called "Bay-Bay," which would be Ronald Adams, TJ Mosley, and one Henry Jones; that he and "Bay-Bay" had talked about getting some money. They had discussed a robbery. He said he recalled that they walked down Genesee Street toward Main going to the bridal shop on Genesee Street. He recalled that "Bay-Bay" had a shotgun underneath his coat. He said that he arrived at the bridal shop. I don't recall the reason, but they turned around and went [59] back to Lennox Street. He said then they got TJ Mosley to drive them down to Genesee Street. He says they were left off by Clifton, I believe—by Clifton Street, and then they looked into the bridal shop and it was closed at this time. Being around 10:00 P.M., then they walked into the—they noticed a pizza parlor that was open on Genesee Street, and they decided to go there, to hold it up; and he stated upon entering the pizza shop he recalls seeing a woman there, and she yelled out to someone in the back room, "A man's got a gun." He says he walked over to the cash register. Then, he heard a shot. He says both of them ran from the pizza parlor, he and "Bay-Bay," and as I recall he fell upon making an exit, on the door I believe, and he hurt his ear. He says then they went to a parking lot next to the Sportmen's Grill on Genesee and Clifton, got into a car, and with TJ Mosley they went back to Lennox Street. But, Irving Dunaway said that he didn't go to 69; that he went to his aunt's home, which I believe it was 26 Lennox Street, and that later—he stated also, that he recalled his aunt mentioning something about his ear. I believe he said he hurt it with a can opener or something to this effect. Then, he went back to 69 [60] Lennox Street and he had a short conversation with "Bay-Bay" or Ronald Adams.
Q. Now, did you see Mr. Dunaway after the morning of the 12th of August, when this stenographic statement was taken? Did you have any conversation with him after that?
A. I don't recall, sir.

Q. Did you or any police official or anyone use any force or pressures on Dunaway to make a statement?
A. None whatsoever, sir, no.
MR. BERGIN: That is all I have. You may examine.

CROSS-EXAMINATION

BY MR. CRIMI:

Q. Detective Dominick, I think you testified it was about nine o'clock in the morning that you saw Mr. Dunaway for the first time; is that correct?
A. Yes, sir.
Q. August 11th?
A. Yes, sir.
Q. Where did you see him?
A. He was at the Public Safety Building, sir, Police Headquarters.
[61] Q. Police Headquarters?
A. Yes.
Q. Did you talk to him at all on that morning?
A. No, sir.
Q. You merely saw him in police headquarters on the fourth floor, I take it?
A. Yes, sir.
Q. You saw him in the interrogation room or where?
A. No, in the hallway, sir.
Q. You had nothing to do with his being talked to by Novitskey, your partner?
A. No, sir.
Q. So, the first opportunity that you had to talk to Mr. Dunaway was at about ten o'clock that night; is that correct?
A. Yes, sir.
Q. You went there because you had gotten a message that he wanted to talk to you?
A. Yes, sir.
Q. Did you at any time that night when you talked to him, did you advise him of any rights, so-called?
A. Detective Novitskey did.
Q. In your presence?
[62] A. Yes, sir.

Q. This was approximately ten o'clock?
A. Yes, sir.
Q. That night; is that right?
A. Yes.
Q. Did he advise him from a card, or did he—
A. I believe it was verbally, sir.
Q. Verbally?
A. Yes, sir.
Q. He gave him all of the rights that you are familiar with yourself?
A. Yes, sir.
Q. The right to an attorney, et cetera?
A. Yes, sir.
Q. Now, Detective Dominick, there is about three or four rights, is there not, that you advise people of?
A. No, sir.
Q. Well, you advise them of the right to an attorney; the right to remain silent?
A. Oh, yes, sir.
Q. Isn't that correct?
A. Yes, sir.
Q. So, at ten o'clock that night Detective Novitskey [63] advised him of each of those rights; isn't that correct?
A. Yes, sir.
Q. You had nothing—strike that. Then, at seven o'clock—how long was this conversation at ten o'clock?
A. It wasn't long, sir. I don't think it was five minutes.
Q. Then, you saw Mr. Dunaway again in the morning; is that correct?
A. Yes, sir.
Q. When you saw him in the morning, was there any conversation with him prior to the stenographer coming there, or was it all simultaneous?
A. I don't recall, sir.
Q. You do not recall?
A. No.
Q. At that time did you readvise him of his rights?
A. I would have to say it was Detective Novitskey, sir.

Q. Did you make any report or notes as to your activity concerning what you have testified to today, a supplemental report or anything?

A. Well, there were many supplemental reports filed in this particular case, but I don't recall any about what I have just testified to, no.

Q. There was no report made by you concerning what you have [64] testified to today; is that correct?

A. I don't recall any, sir, no.

MR. CRIMI: Well, Your Honor, I think Detective Novitskey said that he did make a report.

THE COURT: The officer's testimony, I think, is controlling.

MR. CRIMI: Well, if there is—

THE COURT: Officer Novitskey, according to my recollection, was not sure whether any report was made. You may ask again, if you wish, to try to refresh your recollection.

Q. It is your testimony that you did not or you do not recall making a report?

A. I honestly don't recall, sir.

Q. You could have made a report?

A. It is possible, yes.

MR. CRIMI: Well, I think in this posture, Your Honor, I think if the District Attorney has the report he should allow me to look at it for purposes of cross-examination.

THE COURT: If he has it, he will furnish it.

MR. BERGIN: I have a report here, Your Honor. I do not know if it is this officer's or not. [65] It appears to be.

May I identify this myself first with him to see whether it is?

THE COURT: Yes.

PRELIMINARY EXAMINATION

BY MR. BERGIN:

Q. Detective Dominick, is this your report?

A. Yes, sir.

MR. BERGIN: Your Honor, I will object. I would like to show the report to the Court. I would object to just giving this to Defense counsel at this time. It contains a lot of other material. It contains the names of witnesses and other investigative work that this officer did not testify to.

THE COURT: I suppose the testimony in this case is somewhat limited to the voluntariness of an alleged confession; isn't it, Mr. Crimi?

MR. CRIMI: I am sorry, Your Honor, I did not hear you.

THE COURT: Any testimony in this hearing is limited to the voluntariness of any alleged confession. It does not include the testimony [66] as to the commission of the alleged crime itself.

MR. CRIMI: That is right.

THE COURT: Well, if this report has nothing to do with this statement, any statement that was made in the detective's presence, I cannot see where it is relevant at this time.

MR. CRIMI: Well, I do not understand District Attorney to say that there is nothing in there.

MR. BERGIN: No, I didn't say that. Maybe I should make myself more clear.

There is material in this report concerning the apprehension of Mr. Dunaway and some things that have been testified to, but there is an awful lot of other matters in here that has no part of this hearing.

MR. CRIMI: Is it severable?

THE COURT: I will rule that anything that is germane to this hearing or to the purpose for which it is had may be examined by defense counsel at this time.

MR. BERGIN: All right. Your Honor, I will [67] give Mr. Crimi the report, and I know he will just refer to the reports that are germane to this hearing.

MR. CRIMI: All right.

CROSS-EXAMINATION

BY MR. CRIMI CONTINUED:

Q. Did you testify before the Grand Jury?
A. I'm quite sure I did, sir. Yes.
MR. BERGIN: No, he did not.
MR. CRIMI: Just a minute, Your Honor.
THE COURT: Yes.

(Whereupon Mr. Crimi had a moment.)

MR. CRIMI: I have no further questions, Your Honor.

MR. DONOVAN: Before I decide, I would like to see the statement myself, Your Honor.

THE COURT: Yes.

(Whereupon Mr. Donovan reviewed the statement.)

MR. BERGIN: If Your Honor please, I object to Mr. Donovan reviewing all the report, and I know he will do it in the nature of Mr. Crimi. The first part of this report refers to the testimony in this hearing. [68] THE COURT: Well, inasmuch as the report is not severable, I rule that Mr. Donovan, representing Mr. Mosley, has a right to examine the report as it concerns the matters testified to in this hearing.

MR. BERGIN: Thank you, Your Honor.
MR. DONOVAN: I have no questions.
MR. BERGIN: I have no further questions.

* * * *

[75] MR. CRIMI: Your Honor, at this time I move that the Court order excluded and stricken from the record any and all testimony relating to the alleged admissions and/or confessions made by the Defendant Irving Dunaway, as testified to by two detectives, two or three [76] detectives in this hearing, on the grounds that such admissions and/or confessions are made without the proper advice of counsel, and I am referring to those constitutional rights which were spelled out in Miranda versus Arizona, a Supreme Court case, and a waiver of those rights as spelled out both in the case of

Miranda versus Arizona and in the case of Johnson versus Zerbst, also a Supreme Court case; and the latter case stands for the proposition that before there can be a valid waiver of any constitutional rights, there has to be, on the part of the person waiving it, an intelligent and understanding waiver of these rights, and a waiver which is consonant to an understanding of the rights and what he has given up.

The testimony in this particular hearing indicates that verbally at about nine o'clock when the defendant was at Police Headquarters and in an interrogation room, in a police atmosphere, he was verbally asked—or advised, I should say, of his rights to [77] remain silent; and that he did not have to answer any questions, and his right to have an attorney, et cetera, as testified to by Detective Novitskey; and Detective Novitskey then said that he asked him, he asked the defendant whether he understood him, and the defendant said, "Yes," and then he asked the defendant, "Do you agree to waive these rights and consent to us talking to you," and the defendant allegedly said, "Yes."

I say that in looking at this Exhibit which is in evidence and which contains many, or I should say several very fundamental constitutional rights, which speak of self-incrimination, which speak of the right to an attorney, which speak of the right to an attorney in the event that you cannot afford one, and also which more importantly talks about a waiver of such rights, that just the mere asking in a police atmosphere and in an interrogation room, just the mere asking is—"Do you understand these," and "Did you agree to waive these rights," [78] is not a sufficient showing that that individual understands what his rights as a citizen were, understands the consequence involved and understands what it meant to waive these rights.

As part of the motion, then, I contend that there not being sufficient evidence of an understanding, an intelligent waiver of these rights, assuming that the rights were read or given to him at the time that the detective testified, which we must assume, because that is the state of the evidence at this point. Assuming that, I say

that there is not sufficient proof of an intelligent waiver and understanding of these rights, and if the Court were to agree with me, that it would seem to me that this would become a primary illegality, which would then effect the subsequent testimony as to Exhibit 2 and 3 in evidence.

I have a further motion that deals with the suppression of the evidence, and the basis of that is that the testimony, to this [79] point, indicates that on August 11th at approximately seven—strike that out—at approximately 8:30 in the morning the three detectives left in a police car, went to the defendant's residence on Broad Street. One detective stationed himself in a driveway, admittedly to watch and see whether there was any situation that might arise that the person whom they were looking for might try to get away, and I think one detective went to the front door and one detective was in the car. Subsequently they walked to another home where the detective also positioned himself in the driveway and one went up to the front door, and then the three left, including the defendant, in a car and brought down to headquarters.

I think that those facts specify custody, and that in effect, at that particular point, the defendant was under arrest. He had lost his freedom of movement as defined in the Miranda versus Arizona case; and furthermore, there is testimony by Detective Dominick [80] that when he had seen the defendant, it was nine o'clock and the defendant was under arrest; and further, there is testimony that these rights were not read or at least not told to the defendant until after the defendant had admitted that he knew something about the incident in which they wanted to question him on.

I, therefore, say that the custody and the questioning besides my contention that they followed, they were followed by an unintelligible waiver of the rights, and also taken a period of custody for which there was and has not been established any probable cause to hold the defendant for any questioning whatsoever. That comes under the case of—

THE COURT: A Supreme Court case?

MR. CRIMI: It is a Supreme Court case. It started in New York. It begins with an M. I can supply the Court with that case.

THE COURT: It is a Supreme Court case?

MR. CRIMI: It is a Supreme Court case.

THE COURT: I do not know what it is.

[81] MR. CRIMI: It begins with an M, and I confuse it with Miranda. Morales versus New York. That case held that any questioning during the period which the defendant was in custody without there being probable cause vitiates any questioning or any statement taken during that time.

THE COURT: Your motion, in all respects, is denied.

MR. CRIMI: Exception, Your Honor.

THE COURT: On your motions.

MR. CRIMI: Exception, Your Honor.

THE COURT: Have you anything, Mr. Donovan?

MR. DONOVAN: Nothing, Your Honor.

MR. CRIMI: The defendant wishes to testify.

IRVING JEROME DUNAWAY, Defendant, called herein as a witness on behalf of himself, having first been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. CRIMI:

Q. Would you kindly state your name, please?

A. Irving Jerome Dunaway.

Q. Mr. Dunaway, would you please speak as loudly as you [82] possibly can. Are you the defendant in this case?

A. Yes.

Q. How old are you now?

A. Nineteen.

Q. When were you born?

A. November 28, 1952.

Q. Did you gradaute from high school?

A. No, I didn't.

Q. How far did you go in school?
A. To the 10th grade.
Q. When did you finish the 10th grade?
A. 1969.
Q. Now, did there come a time on August 11, 1971, at approximately 8:30 in the morning that you saw some policemen?
A. Yes.
Q. Can you tell us where you were at that time?
A. I was at a friend's house, 102 Walnut Street.
Q. Tell us what happened at that time and place?
A. About eight o'clock my sister came over. She told me that the police were at my house on Broad Street. She said they wanted to question me about something. So, I opened the door to go home on Broad Street.
[83] Q. All right. Where do you live?
A. 865 Broad Street.
Q. How far is 865 Broad Street from that Walnut Street address that you were on?
A. About a half a block.
Q. Your sister had come over to Walnut Street and brought that message to you?
A. Yes.
Q. After she had given you that message, you then did what, if anything?
A. I was leaving to go to my house on Broad Street.
Q. All right. Well, then, tell us what happened as you were leaving?
A. As I walked out the door there was a detective at the bottom of the steps. As I came down the steps he grabbed me by the arm, and he called another detective from the rear of the house. The other detective came and he got me by the belt of the pants, and then we started walking toward Broad Street. When we got around to Broad Street there was another detective in the cleaner's next door on the telephone. They called, and then they put me in a car and we left.
Q. All right. At the time that you came out of the door, [84] can you tell us whether or not the detective

asked you who you were, or any conversation whatsoever?
A. No. We just told the other detective—he just said, "I got him."
Q. All right. Now, then, you eventually got in the car?
A. Yes.
Q. Do you recall where you were sitting in the car?
A. In the back seat.
Q. Was there anybody else sitting with you in the back seat?
A. There was one detective in the back seat.
Q. Now, these two detectives that you have talked about, did you see him here testifying today?
A. Yes.
Q. You did?
A. Yes.
Q. Once you got into the car, where did you go, if anywhere?
A. To the Detective Bureau, Civic Center.
Q. Now, was there any conversation in the car concerning what they wanted to talk to you about or any conversation about anything?
A. No. I only asked them why they wanted to talk to me.
Q. What did they say?
[85] A. Nothing.
Q. So, they did not converse with you the facts of this case?
A. No.
Q. All right. Have you any recollection about what time it was when you got to the police headquarters?
A. About twenty or quarter of nine, or nine o'clock.
Q. Do you know where they took you?
A. They took me to a room in the Detective Bureau.
Q. All right. Now, the two detectives that picked you up, were they ever in that room with you?
A. I don't remember.
Q. Who was in the room with you, if anyone?
A. At first they put me in a room and they left. Then, another—I think it was a lieutenant came.

Q. Did he talk to you at all?
A. Well, he told me—first, he asked me did I know a Ronald Adams, and then he asked me do I know a Hubert Johnson. Then, he told me that he had got some information from Hubert Johnson that I and Ronald Adams were in the pizza parlor on Genesee Street.
Q. All right. This was a lieutenant, was he?
A. I think it was a lieutenant.
[86] Q. Was it anybody that testified here today?
A. Yes.
Q. Well, which one of the fellows that testified today was it?
A. The third one.
Q. The white-haired fellow?
A. Yes.
Q. All right. Now, before he—strike that out. When did he, if he did, advise you of your right to have an attorney, your right to have an attorney if you could not afford an attorney, of your right to remain silent, of your right to know that anything you said would be held against you? When did he advise you of those rights?
A. Just before he got ready to take the statement.
Q. Now, when you say got ready to take the statement, what do you mean by that?
A. When the man came in with the shorthand, that wrist shorthand.
Q. So, that up to the time to just before the man came to take the statement, you say you were not advised of any of the rights; is that correct?
A. Yes.
[87] Q. Now, how long was it from the time that you go to headquarters to the time that the man came down to take the statement?
A. Between forty-five minutes and an hour, I'd say.
Q. During that time were you talking to the detectives?
A. Yes.
Q. How many people were in there, the one person that you were talking to or more than one?
A. I think it was three.

Q. Three?
A. Yes.
Q. You were talking to these people while you were there?
A. Yes.
Q. During that time did you draw these diagrams?
A. Yes.
Q. Now, you drew these diagrams before you were told about your various rights; is that correct?
A. Yes.
Q. During that time did anybody threaten or abuse you or beat you or anything like that, Irving?
A. No.
Q. Your answer is no; is that correct?
A. No.
[88] Q. I want to show you in this Exhibit 1, and outside of today, when was the first time that you saw this, if you did, this particular Exhibit?
A. The morning after my arrest.
Q. That would be August 12th?
A. Yes.
Q. About what time, if you can recall, did a stenographer or the man who came to take the statement, about what time was it?
A. It was after ten o'clock.
Q. After ten o'clock?
A. Yes.
Q. When that man came down, then, what if anything was said or done in relation to your rights?
A. I was told my rights, then, after we came down.
Q. All right. After you were told your rights, then, they started asking you questions again?
A. Yes.
Q. Now, Irving, is that the first time you were told your rights from the time you were picked up at 8:30 that morning?
A. Yes.
Q. Then, you did discuss and answer questions, and the [89] man took them down; is that right?
A. Yes.

Q. Later on that day did there come a time that you saw the detectives again?
A. Yes.
Q. About what time was that?
A. It was at night. I'm not sure what time it was.
Q. What occurred then, if anything?
A. The detective asked me if I know where they could find a Ronald Adams.
Q. Now, how many detectives were there at that time?
A. Two.
Q. Two?
A. Yes.
Q. Did you see them here today in court?
A. Yes.
Q. You do not know their names, do you?
A. No.
Q. Would it refresh your recollection if I said the third and fourth detective?
A. Yes.
Q. That testified here?
A. Yes.
[90] Q. Now, before they started to talk to you at that time, did they say anything about your rights or remind you of your rights or anything?
A. No.
Q. How long did you talk to them that night?
A. About twenty-five or ten minutes.
Q. Can you tell us whether or not you had requested them to come and see you that night?
A. I don't know.
Q. You don't remember?
A. No.
Q. When did you see them again, if any?
A. After that night?
Q. Yes.
A. The next morning.
Q. Where was that?
A. Well, one detective came upstairs and got me from the city lockup.

Q. Where did you go?
A. To the detective bureau.
Q. What happened when you got there?
A. He told me that he wanted to take another statement.
Q. All right. Before they took that statement from you, [91] did they say anything to you about your rights?
A. Yes. He told me my rights.
Q. And the stenographer was present at that time?
A. Yes.
Q. You did then answer questions; is that correct?
A. Yes.
Q. Well, on the two occasions prior to the questioning of the statements that you were told your rights, can you tell us whether or not you understood what was said to you and what you were waiving? Did you understand what they were telling you?
A. I really didn't understand.
Q. Had you ever been questioned by police before in your life?
A. No.
Q. Have you ever been in an interrogation room before?
A. No.
Q. Now, throughout all of this—strike that out. All these times that you talked to the detectives, did they at any time hit you or physically abuse you at all?
A. No.
MR. CRIMI: That is all. You may examine.

[92] CROSS-EXAMINATION

BY MR. BERGIN:

Q. Mr. Dunaway, you have gone to the 10th grade in Rochester; is that right?
A. Yes.
Q. Your education?
A. Yes.

Q. That was at Madison High School?
A. Yes.
Q. Where did you go to school before Madison?
A. Number 30 School.
Q. Is that in the City of Rochester?
A. Yes.
Q. How long had you lived in Rochester? Were you born in Rochester?
A. Yes.
Q. You attended schools in the Rochester City District?
A. Yes.
Q. Throughout your ten years of schooling?
A. Yes.
Q. Where was the primary school? You gave me a number. Where was that located; in the City?
A. I think it was Otis Street.
Q. How many grades did you go there?
[93] A. I finished the 6th grade.
Q. Then, where did you go?
A. Madison.
Q. Did you go to Junior High School at Madison, then?
A. Yes.
Q. Then to the regular high school after junior; is that right?
A. Yes.
Q. What did you do after you left school?
A. I went to Job Corps.
Q. To the Job Corps?
A. Yes.
Q. Did you work there?
A. Yes.
Q. What type of work did you do there?
A. Electronics.
Q. Electronics?
A. Yes.
Q. Did you work for an employer, for some company, or what?
A. No, it was like a school.

Q. Where is that located?
A. I was at a camp in Edison, New Jersey. I was transferred from there to Indianapolis.
[94] Q. What did you study in Edison, New Jersey?
A. Electronics.
Q. From there you went to Indiana?
A. Yes.
Q. What did you study there?
A. Electronics.
Q. When did you leave Indiana?
A. I can't remember, but I stayed in Job Corps for six months.
Q. Where did you go from Indiana, from your work there?
A. Back home.
Q. Back to Rochester?
A. Yes.
Q. Did you work here back in Rochester when you came back or not?
A. Not as soon as I got back.
Q. But, did you obtain employment sometime later?
A. Yes.
Q. Where did you work then?
A. I think it was the Farm Metal Division.
Q. What?
A. Farm Metal Division.
Q. Metal Division?
[95] A. Yes.
Q. Who was at 102 Walnut Street? You said there was a friend who lived there?
A. A friend of the family's, yes.
Q. That is where you were arrested?
A. Yes.
Q. You say the police officers did not say anything to you at all; they just grabbed a hold of you and took you in?
A. Well, after the first one grabbed my arm, he told the other one, "I got him." That was all he said.
Q. Had you ever met these officers before?
A. No.

Q. They didn't ask you who you were?
A. No.
Q. Is there any way they would have known who you were?
A. I'm not sure.
Q. You say they didn't ask you who you were?
A. No.
Q. You heard the detectives say here this morning, "Are you Mr. Dunaway," and he said, "Yes." Do you deny that?
A. Pardon me?
Q. You deny that you indicated your name to them?
[96] A. I don't remember.
Q. You don't remember what?
A. Telling them my name.
Q. You don't remember telling the detectives your name?
A. No.
Q. You don't think they just pick up anybody without knowing who the person was if they didn't have a name.
A. They—
Q. Pardon?
A. I don't remember—I don't remember telling nobody.
Q. You don't know?
A. I don't remember.
Q. What time was it that they came to this address and took you in?
A. About eight o'clock.
Q. You have heard the detectives testify to the various times involved here. Were the detectives correct in their times?
A. I don't—
Q. The times that the officers gave you, is that your memory of the times when you were arrested, taken downtown and gave these various statements?
A. No.
[97] Q. What?
A. Would you repeat that, please?

Q. All right. You said they came and got you about eight o'clock?
A. Yes.
Q. Then, you were taken right downtown?
A. Yes.
Q. And at nine o'clock Detective Novitskey started talking to you; is that right?
A. Yes.
Q. Then, a stenographer came later on and you were talked to in the presence of the stenographer; is that right?
A. Yes.
Q. How long were you there before the stenographer came?
A. Hour and forty-five minutes.
Q. Are these diagrams that you were shown here, you yourself drew those diagrams?
A. Yes.
Q. Were you told what to draw or anything?
A. I was told to draw it.
Q. You were asked to draw a diagram, but you provided the information on the diagram; is that true?
A. Yes.
[98] Q. Now, the evening of your arrest on August 11th, you were talked to again in the detention area by the detectives; is that right? They came up and talked to you again?
A. Yes.
Q. Did you ask someone in the jail there that you wanted to say something further to the detectives?
A. I don't remember asking him.
Q. You do not remember that?
A. No.
Q. Then, it is possible that you may have asked to see the police again?
A. Yes.
Q. You are not denying that?
A. No.
Q. These statements that the police testified to, you gave these statements voluntarily to the police; did you?
A. Yes.

MR. BERGIN: Thank you, sir.
MR. CRIMI: That is all.
MR. DONOVAN: I have no cross.
THE COURT: You may step down.

(Defendant excused.)

MR. CRIMI: I do not have any other witnesses, [99] Your Honor.
THE COURT: Any witnesses, Mr. Donovan?
MR. DONOVAN: No, Your Honor.
THE COURT: Any rebuttal, Mr. Bergin?
MR. BERGIN: No, Your Honor.
THE COURT: The proofs are closed.
MR. CRIMI: Your Honor, I repeat each and every motion that I made at the end of the Prosecution's presentation on this hearing, and renew the same with the same force and effect, and with the added advisement that the defendant has now testified and he has testified that he was not advised of his rights until shortly prior to the taking of the stenographic transcript or stenographer statement; and also that he did not comprehend fully the rights or the waiver of the rights as said to him when they were said to him prior to the transcript being taken.

I think that this proof certainly, if nothing else, either negates or equals the proof of the Prosecution, and in the case the Prosecution has not met its burden and at this [100] hearing, to satisfy this Court that these statements should be admissible as being not only voluntarily made, but also as made following the proper advice as dictated by Mirana versus Arizona and other cases which have followed suit.

THE COURT: Is there anything you wish to say, Mr. Donovan?
MR. DONOVAN: Nothing, Your Honor.
THE COURT: Mr. Bergin?
MR. BERGIN: I just urge upon the Court the fact that this defendant is an educated or a person who is brought up in Rochester. He went to the city schools in Rochester, 10th grade. He was given an opportunity

to study electronics out of state. The detective testified here as to the advising of his rights and the defendant said at that time that he understood them.

I think that the proof is sufficient on this hearing, Your Honor.

THE COURT: Upon all the testimony received, I find that the People have proved beyond a [101] reasonable doubt that the defendant Dunaway intelligently understood the warnings and knowingly expressed his waiver of his constitutional rights.

The statements given were entirely voluntary. They were knowingly made and were made with the knowledge of the so-called Miranda rights.

Your motion, in all respects, is denied.

MR. CRIMI: Exception, Your Honor, with respect.

* * * *

DECISION OF APPELLATE DIVISION AFFIRMING JUDGMENT OF CONVICTION

People v. Dunaway (Irving) .... 6-29-73....4th Dept.

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

IRVING JEROME DUNAWAY, APPELLANT,
ET AL., DEFENDANT

Argued September 9, 1974; decided October 23, 1974

Crimes—murder—contentions by defendant, convicted of felony murder and attempted robbery, that statements which, together with hand drawings, were made by him at police headquarters, and which, following pretrial hearing, were found to have been voluntarily made after he was advised of, and waived, his constitutional rights, were elicited following seizure of his person without probable cause, that he was not advised of his rights until after he made oral statements and drawings, that People failed to prove he intelligently and understandingly waived his rights, that admission of photographs of decedent constituted prejudicial error, that prosecutor's summation deprived him of fair trial, and that sentence imposed upon him was excessive—judgment of conviction was properly affirmed.

People v. *Dunaway*, 42 A D 2d 689, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 29, 1973, which affirmed a judgment of the Monroe County Court (GEORGE D. OGDEN, J.),

rendered upon a verdict convicting defendant of felony murder and attempted robbery in the first degree, sentencing him, upon the murder conviction, to an indeterminate term of 25 years to life, and, upon the attempted robbery conviction, to a concurrent indeterminate term with a maximum of 15 years. Defendant and one Thomas James Mosley were tried jointly for the fatal shotgun shooting of one Philip Argento, the proprietor of a pizza shop, during an attempted robbery which occurred on the night of March 26, 1971. Defendant testified that he had planned the robbery with Mosley and one Adams, a juvenile who had actually fired the shotgun, and who was a prosecution witness; that he had seen Mosley give Adams the shotgun earlier in the evening, but that he did not know Adams had it with him when he accompanied him to the pizza shop. In the Court of Appeals defendant argued that statements which, together with hand drawings, he had made at police headquarters, and which, following a pretrial hearing, were found to have been voluntarily made after he was advised of, and knowingly waived, his constitutional rights, were elicited following a seizure of his person without probable cause; that he was not advised of his rights until after he made his oral statements and the drawings; that the People failed to prove he intelligently and understandingly waived his rights; that the admission of photographs of decedent constituted prejudicial error; that the prosecutor's summation deprived him of a fair trial, and that the sentence imposed upon him was excessive.

Charles F. Crimi for appellant.

Jack B. Lazarus, District Attorney, for respondent.

Order affirmed; no opinion.

Concur: Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER, RABIN and STEVENS. Taking no part: Judge JASEN.

SUPREME COURT OF THE UNITED STATES

ORDERS

June 30, 1975

No. 74-5913. DUNAWAY v. NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Brown* v. *Illinois*, *ante*, p. 590. Reported below: 35 N. Y. 2d 741, 320 N. E. 2d 646.

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

IRVING JEROME DUNAWAY, APPELLANT,
ET AL., DEFENDANT

Reargued November 17, 1975; decided December 29, 1975

Crimes—confessions—after Court of Appeals affirmed order of Appellate Division which affirmed judgment of County Court convicting defendant of felony murder and attempted robbery, United States Supreme Court remanded case to it for further consideration in light of Brown v Illinois (422 US 590)—on reargument following remand, order of Appellate Division is modified and case is remitted to County Court for further hearing and proceedings—prior to defendant's trial, motion was made to suppress statements and drawings made by him on ground that they were obtained during period of illegal detention subsequent to illegal seizure of his person without showing of probable cause, and court ruled only that statements were voluntarily given after proper Miranda warnings and therefore were not excludable on Miranda grounds—no findings were made as to nature of detention, if that it was, and, if it was, whether there was probable cause for detention, and present record is inadequate to support determination of that question—accordingly, there must be factual hearing and such other proceedings as may be necessary to determine issues and, in event there was detention and probable cause is not found for such detention, to determine further question as to whether making of confessions was rendered infirm by illegal arrest.

REARGUMENT, following a remand by the United States Supreme Court, of an appeal, taken by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 29, 1973,

which affirmed a judgment of the Monroe County Court (GEORGE D. OGDEN, J.), rendered upon a verdict convicting defendant of felony murder and attempted robbery in the first degree. (See 35 NY2d 741, affg 42 AD2d 689.)

Charles F. Crimi for appellant.

Jack B. Lazarus, District Attorney (*Edward J. Spires* of counsel), for respondent.

MEMORANDUM. This case has been remanded to us by the Supreme Court of the United States "for further consideration in light of *Brown* v. *Illinois* [422 US 590]." (*Dunaway* v. *New York*, 422 US 1053.) We had previously affirmed appellant's conviction for felony murder and attempted robbery (35 NY2d 741).

On March 26, 1971, two men entered a pizza shop in Rochester, New York, and, in the course of an attempted robbery, one of them shot and killed the proprietor. Four months later, on August 11, 1971, three police officers went to Dunaway's home to question him about his participation in the robbery. If they had any reason for suspecting him the record does not disclose it. Finding him at a nearby house, the police, according to their own testimony, asked Dunaway "to come downtown * * * to talk * * * about something".

There, defendant was taken to an interrogation room where he was given warnings required by *Miranda* v. *Arizona* (384 US 436). He then waived his right to counsel and consented to talk to the detectives. During the course of the interview, Dunaway, at the request of the officers, drew two incriminating sketches and made two inculpatory statements.

Prior to trial, a motion was made to suppress the statements and drawings on the ground that the evidence was obtained during a period of illegal detention subsequent to an illegal seizure of appellant's person without a showing of probable cause. The court ruled only that the statements were voluntarily given after proper *Miranda* warnings and therefore were not excludable on *Miranda* grounds. The Appellate Division affirmed that decision without opinion (42 AD2d 689).

Specifically, no findings were made as to the nature of the detention, if that it was, and, if it was, whether there was probable cause for the detention and, as the District Attorney commendably concedes, the present record is inadequate to support a determination of that question. Accordingly, this case must be remitted to the Monroe County Court for a factual hearing and such other proceedings as may be necessary to determine the issues (*Morales* v. *New York*, 396 US 102) and, in the event there was a detention and probable cause is not found for such detention, to determine the further question as to whether the making of the confessions was rendered infirm by the illegal arrest (see *Brown* v. *Illinois*, 422 US 590, *supra*).

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG, and COOKE concur.

On reargument: Order modified and case remitted to the County Court, Monroe County, for further hearing and proceedings in accordance with the memorandum herein and, as so modified, affirmed.

STATE OF NEW YORK
COUNTY COURT
COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

—*vs*—

IRVING JEROME DUNAWAY, DEFENDANT

Presiding Judge: HONORABLE DONALD J. MARK,
MONROE COUNTY COURT JUDGE.

SUPPRESSION HEARING—August 3 and 4, 1976

* * * * *

[3] THE COURT: For the record, this is the case of the People of the State of New York versus Irving Jerome Dunaway. This is a hearing mandated by the Court of Appeals decision dated December 29, 1975, regarding 38 NY 2812 to determine whether the Defendant, Irving Jerome Dunaway's confession was valid or invalid under the principles enumerated under US, *Brown versus Illinois*, 442 US 590, June 26, 1975.

Is that a correct statement of the proof of the hearing?

MR. CRIMI: Yes.

THE COURT: Are the People ready to proceed?

MR. SPIRES: Yes.

THE COURT: Is the defense ready?

MR. CRIMI: Yes, your Honor.

ANTHONY L. FANTIGROSSI, called herein as a witness, first being duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. SPIRES:

Q. Would you further identify yourself?

A. I am Chief Detective of the Rochester, New York Police Department.

Q. Your rank is major?

[4] A. Major.

Q. Tell us what rank and position you had in 1971.

A. Detective Lieutenant in charge of the Physical Crimes Squad.

Q. As such were you involved in the investigation of a homocide and robbery committed on or about March 26, 1971 on Genesee Street in the City of Rochester, known as the Tower of Pizza murder case?

A. Yes.

Q. Were you so involved on or about August 10, 1971?

A. Yes, sir, I was.

Q. And did a development occur on August 10th that you were involved?

A. Yes, sir.

Q. Tell us about that.

A. I was called at home by Detective Mickelson in regard to an informant that he received the information and the possibility of people responsible for the homicide on Genesee Street. I came into the office and I met with the informant and he conveyed to me that information that the person responsible for the robbery and shooting on Genesee Street was a fellow spending time at the jail and a fellow by the name of Irving, I don't know his last name. He said he knew what he looked like, he would put it [5] through the IDMO file. It is a file of photographs based on descriptions, height, age and weight and into that type of area. He went through the IDMO file and picked out a picture of Mr. Dunaway.

Q. This was Mickelson who done this?

A. Yes, sir. He also informed us about another man by the name of Jones. I got the report here who is now in jail pending an indictment for burglary. I went to the

jail and interrogated Jones for approximately two hours. The information they had given us was Jones admitted to Sparrow that he and Dunaway committed a robbery and killing. In talking to Jones he finally, after two hours, admitted that he had nothing to do with it. The reason he knew is he was serving time at the jail with another man by the name of Adams. Adams told him.

MR. CRIMI: I object. We are getting into hearsay far removed.

MR. SPIRES: It is admissible on the issue of probable cause to arrest. The argument as to whether or not it is insufficient hearsay, is to be made at the conclusion of the proof.

MR. CRIMI: I could understand allowing what the informant tells the witness, but now he is telling us [6] what the informant heard from somebody else. I think we are getting into a field of double and triple hearsay. That is my objection.

MR. SPIRES: I will respond later.

MR. CRIMI: I have an objection.

THE COURT: Off the record.

(Whereupon there was an off the record discussion.)

THE COURT: Please excuse the interruption. The objection is overruled.

Q. Major Fantigrossi, since the recess have you had a chance to refer to your report concerning the matter?

A. Yes.

Q. Does that report indicate whether or not the man you described as Jones, whether that was the correct name?

A. No, James Cole.

Q. If I may substitute for the name Cole for Jones, please. You used it and after you used it, after you had spoken to Mr. Cole for two hours, he told you you were about to—

MR. CRIMI: I object, that is leading.

THE COURT: Sustained.

Q. What did Mr. Cole tell you?

A. He stated to me at about a month or two before, while at jail, that there was a fellow by the name of

Adams in jail [7] with him. At the time when I was speaking, Adams was sentenced to Elmira and he told me that Adams described to him that his brother referred to as bad was involved in the Tower of Pizza shooting and his brother did the shooting which he did not intend to do. That is the way he explained it to him. The fellow with him, a fellow by the name of Irving, also known as Axlerod.

Q. Did that conclude pretty much your conversation with Cole?

A. Yes, sir.

Q. What did you do then?

A. Back to the Public Safety Building and I directed several teams of detectives to go out and see if they could find Adams and Dunaway.

Q. Had you, at that time, determined at the time you gave the direction to these teams of detectives at that time, to determine who Axlerod was?

A. Axlerod was Dunaway.

Q. You determined that through your investigation?

A. We first received the information as Irving, the picture was picked out by Sparrow.

MR. CRIMI: I object to all of this. This is a series of hearsay transactions in determination and conclusions made without any basis in fact. It [8] seems to me—

THE COURT: Overruled.

MR. CRIMI: Exception.

THE COURT: Noted.

Q. I think you interrupted in the middle of your response. The question was whether or not you had determined that Dunaway was Axlerod through the IDMO information.

MR. CRIMI: It is leading and improperly framed.

THE COURT: Sustained as leading.

Q. How did you determine that Dunaway was Axlerod?

A. That was his nickname.

Q. How did you determine that?

A. I don't know if it was on the record that we discovered that Dunaway was also referred to Axlerod.

Q. When you directed teams of detectives to seek Adams and Dunaway, what direction, if any, that you recall, did you give to the detectives concerning Mr. Dunaway?

A. Pick him up and bring him in.

Q. Did you at that time that you issued these directives believe you had probable cause to arrest Dunaway?

MR. CRIMI: I object to that question.

THE COURT: Sustained. I think that is a question for this Court to determine.

[9] Q. Did you at any time direct any of these detectives to arrest Dunaway?

MR. CRIMI: I object to the word "arrest."

THE COURT: Overruled.

THE WITNESS: I don't know if I said arrest and investigation. The name comes up and suspect's name comes up and we pick them up and bring them in for questioning.

Q. Your instruction was to pick him up and to bring him in?

A. Yes.

MR. SPIRES: No further questions.

CROSS-EXAMINATION BY MR. CRIMI:

Q. Did you testify before the grand jury on this matter?

A. I don't believe I did.

(Whereupon there was an off the record discussion.)

MR. SPIRES: In the event Major Fantigrossi testified, it will be furnished to you.

THE COURT: If Mr. Crimi wants to call him back, it will be granted.

MR. CRIMI: If I call you Lieutenant, excuse me. You have been promoted since the last time I had you. What time on August 10, 1971, that you received a call from Detective Mickelson?

A. May I refer to my report?

[10] Q. Yes.

A. 20:30 hours, would be 8:30 in the evening.

Q. That he told you at that time that he had information from an informant, is that correct?

A. Yes, sir.

Q. That information was that a James Cole was one of the people who had something to do with the killing of Philip Argento?

A. Correct.

Q. During that phone call with Mickelson, did he mention anything about Dunaway or Adams?

A. No, sir.

Q. Did he tell you who the informant was who told you James Cole was one of the participants?

A. Yes, he did.

Q. Who was the informant?

A. O. C. Sparrow.

Q. So, when you left to go to the Public Safety Building, you were thinking in terms of having James Cole picked up, is that correct?

A. First I wanted to talk to O. C. Sparrow before we went to Cole. I wanted to talk to Sparrow. Sparrow was interrogated.

Q. You wanted to check out the information that Cole had given [11] to Mickelson?

A. No, Sparrow had given to Mickelson.

Q. Sparrow had given to Mickelson?

A. Yes.

Q. Then you did talk to Sparrow, is that correct?

A. Yes, sir, I did.

Q. Had you ever had occasion to talk to Sparrow before?

A. I don't believe so.

Q. And Sparrow told you that Cole had said to him that he, Cole and someone by the name of Irving had been involved in the shooting?

A. Yes, sir.

Q. It turned out it wasn't true that Cole was involved in the shooting?

A. We found that out after we questioned him at the jail.

Q. Cole was already incarcerated?

A. Yes, sir.

Q. Now, you also testified that you then talked to Adams, is that correct?
A. No.
Q. You didn't?
A. No, I didn't testify to talking to Adams.
Q. Somebody talked to Adams, who was it?
[12] A. You mean Dunaway was picked up?
Q. Yes, sir.
A. No, sir, Adams was picked up after Dunaway.
Q. There is two Adams?
A. No, the other Adams was in Elmira. Cole had talked to Adams.
Q. Cole told you he had talked to Adams, which Adams?
A. This is Hubert Adams, the brother of the 15-year-old that was arrested on the case.
Q. And Cole, did you talk to Cole and Cole stated to you that he had talked to Hubert Adams?
A. Yes, sir.
Q. Two months before?
A. I am not sure. Let's see, yes, about two months before, right.
Q. That Hubert Adams had told him that his brother BayBay was an individual by the name of Irving, had committed this robbery and murder at the Tower of Pizza?
A. Yes.
Q. Now, had you ever had any dealings with James Cole?
A. No, sir.
Q. And Cole denied that he was involved, is that correct?
A. Yes, sir.
[13] Q. Based on what Cole had told you, you then directed certain men to pick up Adams and Dunaway, is that correct?
A. Yes, sir.
Q. Now, how did you bring that about? How did you make that direction?
A. Well, I am trying to remember as best I can. If I could go with the usual procedure, I informed them to

bring Dunaway in for questioning and Adams in for questioning.
Q. How many men did you call in?
A. I am not sure. I may have called another team.
Q. When you say "team"—
A. Two men.
Q. And, well, one of the teams must have been Mickelson and Luciano?
A. Right.
Q. Were they on duty at that time?
A. I believe Mickelson was just finishing. I am not sure, it is hard for me to remember. Mickelson was involved in the investigation. When they called me in with Detective Ruvio. There is two or three people, this is Section C, detectives, they do not work in Physical Crimes Squad.
Q. Were they in headquarters?
[14] A. They were in my office before I got there originally.
Q. Both teams were in your office?
A. I called the other team after I got the information.
Q. Where was the other team, on duty?
A. No, they went home.
Q. So, you called them at home and told them—what did you tell the other team?
A. They were looking for Dunaway and Adams.
Q. You told them to come in?
A. I believe Novensky and Joe Dominick, I am not sure if they came in that night or not. They were the two detectives. It is hard for me to recall who I called in at that time. I don't have it on my report.
Q. When you gave instructions to your subordinates to pick up an individual, you mean for them to actually bring them physically to headquarters?
A. Definitely, sir.
Q. I take it you made no application for an arrest warrant?
A. No.
Q. You just told them go out and pick them up and bring them in?
A. Yes, sir.

Q. Based upon the information that you had received from Cole, [15] is that correct?
A. Correct.
Q. Now, you never yourself talked to Hubert Adams?
A. No, sir.
Q. Do you know whether Mickelson did?
A. No, sir, he wasn't even here. He was in Elmira.
Q. Who is Hubert Johnson, do you know?
A. Hubert Johnson?
Q. Yes. Did you ever hear that name? I am looking at this now.
A. I didn't hear of that name. No, sir.
Q. Now, were you contacted radio-wise with any of the teams as to whether or not they had successfully succeeded in picking up Dunaway?
A. Not radio-wise. I was in my office, I stated that I didn't know how late I was there. Dunaway was picked up the next morning. I am not sure if I was in my office when he was picked up.
Q. Did you leave instructions that they were to call you when he was picked up?
A. Yes, sir.
Q. Along with your direction, they were to be picked up and brought to the Public Safety Building?
[16] A. Right.
Q. He was going to be questioned, is that right?
A. Correct, sir.
Q. Did you instruct them at the time they picked him up that they would tell him what he was being picked up for?
A. They knew just as much about the case as I did. I doubt very much if I gave them instructions.
Q. Did you advise or instruct them to advise him of his rights when he was picked up?
A. That is the standard procedure. I didn't give them that type of instruction. They are aware of it already.
Q. Did you give them any instruction in the event that Dunaway didn't want to come down to headquarters?
A. No, I did not.

Q. You just said to them to go out and pick him up and bring him in, is that correct?
A. Correct.
Q. I take it, obviously, if you said nothing further that you didn't tell them to make an appointment with him to come in on some other day?
A. No, sir, I wouldn't advise them that way.
Q. Did you do any other further checking before you gave those instructions as to the—Mr. Dunaway's involvement in that [17] matter?
A. Did I do anymore what?
Q. Did you check out Cole's story further before you told the teams to go out and pick up Dunaway?
A. No, sir.
Q. Did you at any time interrogate Dunaway?
A. I believe I spoke to him after he was brought in.
Q. That was when, in the morning?
A. Yes.
Q. That was—do you recall whether this was before or after Detective Novensky spoke to him?
A. I believe—I just can't recall. I know I did speak to Mr. Dunaway.
Q. At some point?
A. Yes, sir.
Q. But you were not there when he was physically picked up at 102 Walnut Street?
A. No.
Q. Did you get a call via the radio or other form of communication when he was picked up at the time he was picked up?
A. I don't recall, but I can't recall how I found out about it, sir.
Q. At any time did you apply for an arrest warrant?
[18] A. No, sir.
Q. There was no question in your mind that he was to be picked up and was to be brought to police headquarters for questioning?
A. No question at all, counselor.

Q. And you did not give any instruction that he should be questioned where they found him or made an appointment for him to come back later?

A. No, sir.

Q. Now, actually, August 10, 1971, when you received this information, was some three or four months after the murder, is that correct?

A. Yes.

Q. Where this crime took place was quite a distance from where they picked up Mr. Dunaway, is that correct, sir?

A. Walnut Street, I would say is a mile, a mile and a half from Genesee Street.

Q. It is not in the approximate neighborhood?

A. No, sir.

Q. This information that Mr. Cole related to you was in itself a month or two old when he had talked to Hubert?

A. Right.

MR. CRIMI: No further questions.

[19] REDIRECT-EXAMINATION BY MR. SPIRES:

Q. At this time you gave the instructions to detectives to pick up Dunaway and bring him in. Did you ever consider applying for an arrest warrant?

MR. CRIMI: I object.

MR. SPIRES: You asked him.

THE WITNESS: I didn't have enough information to get a warrant.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. You had not enough information to get a warrant, Major, but there is no question that you wanted him physically brought down to headquarters and questioned at headquarters, is that correct?

A. That's correct.

Q. I take it that you are saying you didn't think that your information would have required an application for an arrest warrant?

A. That is correct.

Q. You're allegedly saying that your information was sufficient to physically pick up a suspect and bring him down to headquarters?

A. I wouldn't do it any other way, counselor.

Q. And do you think that—did you tell him he had to come [20] down voluntarily or had to bring him down?

A. I told him to bring him in.

Q. You told them to arrest him?

A. If you are talking about taking away the freedom of movement, if that is the word, yes, then it is arrest.

Q. Yet if you restricted his freedom of movement and it is an arrest, you still don't think you had probable cause, do you?

A. I think I had probable cause to bring him in and pick him up. I doubt if I had probable cause to charge him.

Q. You differentiated between probable cause to arrest a person and probable cause to charge a person?

A. Right, counselor.

Q. How do you differentiate a probable cause for a warrant of arrest from probable cause from seizing a person and bringing him in to headquarters?

A. Probable cause to obtain a warrant, you must have enough information to substantiate a charge. In probable cause of picking up a man for questioning, which is done all the time based on information, this is done also.

Q. Well, it is not what is done—

A. That is to bring him in. I think I have that right as a police officer. If I haven't, I just found out.

[21] Q. You think you have the right to physically remove a person from his home and bring him down to headquarters with insufficient information to get an arrest warrant?

A. Yes, I would say yes.

Q. So, that you don't want Mr. Dunaway to be detained on the spot and questioned, you wanted him physically brought down to headquarters and in your interview rooms to be interrogated?

A. That's true, counselor.

MR. CRIMI: Thank you. That is all.

REDIRECT-EXAMINATION BY MR. SPIRES:

Q. As long as you are talking about standard procedures in this area, did you at any time direct your detectives who were sent on missions to pick up suspects and bring him in for questioning, did they have a particular procedure to follow?

MR. CRIMI: I object to the standard procedures. They may be wrong for all I know.

MR. SPIRES: So, what—

MR. CRIMI: That is not the issue. What did they do in this case?

MR. SPIRES: It certainly is. If their procedures are to go out and pick up somebody and bring them in, [22] they might not find it necessary to pick the person up. This is the area that I want to find out.

THE COURT: I think you should give the question to Officer Fantigrossi as to what the instructions were of Fantigrossi of the teams.

Q. Let me ask a further question. I will strike that. I think perhaps another witness may clarify the matter. Thank you.

(Whereupon the witness was excused.)

GERARD LUCIANO, called herein as a witness, first being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SPIRES:

Q. Before we proceed with the questioning, may I ask Court to take judicial notice of the entire transcript of the prior proceeding before Judge Ogden which constitutes a pretrial hearing under the admissibility of the confession and statement so that the entire transcript may be considered as evidence in the case.

MR. CRIMI: I quite frankly, I don't know what the procedure is and how these proceedings are to be handled. I don't know what your Honor wants as far as this hearing is concerned. The mandate [23] from the Court of Appeals seems to indicate they wanted to find out whether there was an illegal detention or custody involved and

what effect that would have to the subsequent taking of the statement.

Now, somehow I think that, however you want to word it or phrase it, the records of the first trial, particularly the pretrial suppression hearing certainly should be part of this proceeding, but this is on the other hand a supplemental hearing. I don't want to be restricted as to what was in the record.

THE COURT: Insofar as applicable, the Court will take into consideration the pretrial hearing and you are not limited to follow the mandates of the Court of Appeals and elicit any testimony that you find applicable to this proceeding.

(Whereupon Mr. Spires commenced his direct-examination of Officer Luciano.)

Q. Now, Gerard Luciano, what is your present rank and position?

A. I am Detective, Grade B, assigned to the Narcotics Squad.

Q. The Rochester Police Department?

A. Yes, sir.

[24] Q. You testified, did you not, at a previous hearing before Judge Ogden in this matter?

A. Yes, sir.

Q. And have you had occasion before taking the stand today to read over that prior testimony that you gave and to refresh your recollection?

A. Yes, sir, I did.

Q. And referring, if I may, to your previous testimony in 1971. I believe you went to Dunaway's house where Dunaway was located on August 11, 1971?

A. Yes, sir.

Q. I think you testified there was a time you came out of the house?

A. Yes, sir.

Q. Did you see him emerge from the doorway of the house?

A. Yes, sir.

Q. Then did you go over to him at that place?

A. Yes, sir, when he was coming down the steps.

Q. Did you, if you recall, touch him in any way?
A. No, sir, not that I can remember.
Q. Again, referring to your prior testimony, as I understand it, Detective Mickelson walked with Dunaway to the police car?
[25] MR. CRIMI: I object to this. I am trying to make a record here and referring to the Defendant, I feel it would be ordinarily, if he asked what he did on that particular day.
MR. SPIRES: I am trying to avoid duplicating the record.
MR. CRIMI: I don't know how you are going to review the case going from the testimony here and going back to the trial at the time or previous records.
MR. SPIRES: I am willing to let Mr. Crimi have whatever leeway he needs on cross-examination as to both questions asked, today or previously asked.
MR. CRIMI: That is not the point. The point is you should ask him what he did on that particularly day and not referring to the testimony. How do I cross-examine him? I object to the form of the question.
THE COURT: You want it treated as a de novo hearing?
MR. CRIMI: Yes.
MR. SPIRES: I don't think that is the intent of the Court of Appeals. The issue is not developed in the prior hearing.
THE COURT: I am sure your understanding of that decision is correct.
[26] MR. SPIRES: I am trying to avoid duplicating where Judge Ogden went through and agree the question is leading. I explained why I was proceeding in that fashion.
Q. Did you have any instructions from anyone that morning, the morning of August 11, 1971 what to do with relation to Dunaway?
A. No, sir.
MR. CRIMI: No?
THE WITNESS: No.
Q. How did you come to be at the premises where you encountered Dunaway?

A. I was sent to the Public Safety Building to pick up Mickelson and Ruvio. On the way back to the unit we were working they decided to stop by Broad Street where Dunaway lived to find out one more time if he was home.
Q. Did you go from the Public Safety Building to pick up Mickelson and Ruvio?
A. No, sir, I went to the Public Safety Building to pick them up.
Q. And then the three of you proceeded to Broad Street to try one more time to locate Dunaway?
A. Yes, sir.
[27] Q. You hadn't previously tried to locate them?
A. No, sir.
Q. You and Mickelson and Ruvio had?
A. Yes.
Q. Were you just transportation for those two detectives?
MR. CRIMI: I object, it is leading and suggestive.
THE COURT: Sustained as leading.
Q. Did you know the purpose of Mickelson and Ruvio's trip to Broad Street?
MR. CRIMI: I object to that, your Honor.
THE COURT: Overruled.
THE WITNESS: To see—
MR. CRIMI: It is calling for him to know the operation of the mind of Ruvio and Mickelson.
MR. SPIRES: Maybe they told him.
MR. CRIMI: That is hearsay.
MR. SPIRES: So hearsay is permitted by statute on this hearing.
THE COURT: You may ask what they told him as to the hearsay, it is overruled.
MR. CRIMI: Exception.
THE COURT: Exception noted.
Q. Did you know why they were going out there?
[28] A. Yes, sir.
Q. Why?
A. To see if Dunaway was home.
Q. Do you know why they wanted to do that?
A. Yes, sir, they were going to pick him up if he was home.

Q. Now, how do you know that?
A. They told me that.
Q. Who told you?
A. Mickelson.
Q. What did he say?
MR. CRIMI: This is not on the probable cause, this is plain hearsay.
MR. SPIRES: Mr. Crimi made the same objection at the original hearing. The U. S. Supreme Court, both Federal and State Supreme Court said hearsay is admissible when dealing with the case of probable cause to arrest. Does this particular question have anything to do with probable cause?
MR. CRIMI: I don't, your Honor—I don't want to elongate the hearing. If there comes a time when this individual, who is on the stand, says he did arrest Dunaway, then I could see that the hearsay comes in. We are at a point, from what I under- [29] stand, that he was there as transportation for Ruvio and Mickelson. I don't think there is proper foundation laid.
MR. SPIRES: If I can, more than on the issue of probable cause, Article 740 of the Criminal Procedure Law, the procedure to be followed on the suppression hearing which this is, hearsay evidence is admissible.
THE COURT: Is this relevant to probable cause? That is Mr. Crimi's objection.
MR. SPIRES: If he wants to object on those grounds, I will let the Court rule. I believe it—
MR. CRIMI: My objection is that we have not established what Officer Detective Luciano did there yet, as far as I know.
THE COURT: Sustained at this time.
Q. I would ask the Court to note and Mr. Crimi to note that the Court has taken judicial notice of this witness's prior testimony. All that is in the record, I am trying to bring out something additional we don't have is what the Court of Appeals wanted us to do.
Who was the first person to speak to Mr. Dunaway on that morning of the 3rd?
[30] A. Detective Mickelson.

Q. And did you—were you with Mickelson when he spoke to Dunaway?
A. I was present, yes.
Q. How far away were you when you first spoke?
A. In distance, I can't remember. I was close enough to see Mickelson and the front door and the steps.
Q. Do you know if Dunaway said anything to Detective Mickelson?
A. No.
Q. You don't know or he didn't say?
A. No, I don't know.
Q. Do you know if you heard everything Mickelson said to Dunaway?
A. I heard Mickelson talk to Dunaway.
Q. Do you know if you heard everything Mickelson said to Dunaway?
A. No.
Q. Can you tell us what you did hear Mickelson say to Dunaway?
A. Mickelson said, "Axlerod, Dunaway, do you want to come downtown with us?"
Q. Do you want to come down?
MR. CRIMI: I object to your question. Let him testify.
THE COURT: He is repeating it. Overruled.
[31] MR. CRIMI: Exception.
Q. Did you hear any response by Dunaway?
A. No, I did not.
Q. What happened after you heard this request or statement by Detective Mickelson?
A. Detective Mickelson waved me over to the porch and he started down the steps and Dunaway came after him.
Q. And then?
A. We walked to the police car parked on Broad Street.
Q. The three of you?
A. Yes, sir.
Q. At any time did you observe Mickelson touch Dunaway?
A. No.

MR. SPIRES: No further questions.

(Whereupon the Court was in recess for the date August 3, 1976.)

(Whereupon the Court convened on August 4, 1976.)

(Whereupon Mr. Luciano retook the witness stand, previously sworn as a witness.)

MR. SPIRES: May I be permitted to ask another question or two of the witness?

THE COURT: Yes.

(Whereupon Mr. Spires continued his direct-examination of [32] Mr. Luciano.)

Q. Detective Luciano, did you have a conversation with me a few minutes before court this morning?

A. Yes, sir, I did.

Q. What was the subject of that conversation?

A. I stated to you yesterday when I testified yesterday that I testified I heard Mickelson tell the man at the door, Dunaway, do you want to come downtown with us. I didn't hear him tell Dunway, Mickelson told me.

Q. You are testifying something you stated yesterday was incorrect?

A. Yes. When Mickelson waved me over to the porch he told me, I told him do you want to come downtown, we want to talk to you. He is going with us.

MR. CRIMI: I object. How does that have to do with probable cause?

THE COURT: He is correcting the testimony, is that correct, Mr. Spires?

MR. SPIRES: Yes, sir.

MR. CRIMI: I guess you overruled my objection.

THE COURT: I think you have a motion to strike at the conclusion of the question and answer.

A. Then we proceeded to the police car.

[33] Q. Let me ask you to clear up the record. When Detective Mickelson spoke to Dunaway on the morning of August 11th, did you hear Detective Mickelson speak to Mr. Dunaway?

A. Yes.

Q. Did you hear what he said?

A. Just Axlerod or Dunaway, that was it.

Q. The part about coming downtown was not done by you?

A. No, sir.

Q. That was told to you later?

A. Right.

CROSS-EXAMINATION BY MR. CRIMI:

Q. Detective Luciano, the events you have been testifying to occurred on August 11, 1971?

A. Yes, sir.

Q. I think you testified—strike that. About what time was it that you went to the home of Mr. Dunaway on Broad Street?

A. Around 8:00 o'clock.

Q. In the morning?

A. Yes.

Q. What was your tour of duty that particular day, August 11, 1971?

A. 7:00 in the morning to 3:00 in the afternoon.

Q. Prior to 7:00 in the morning, had you had anything to do [34] with this particular case?

A. No, sir.

Q. I take it that prior to 7:00 o'clock in the morning, August 11, 1971, you had no conversation with Lieutenant Fantigrossi?

A. No, sir.

Q. Not correct?

A. No conversation.

Q. Can you tell us—strike that. You started your tour of duty at 7:00 that morning?

A. Yes, sir.

Q. I take it you went to the police headquarters?

A. No, sir.

Q. Where did you go?

A. At the time we were working out of an office at the Police Academy on Scottsville Road.

Q. That is where you reported that morning?

A. Yes, sir.

Q. Approximately an hour later you were on Broad Street?
A. Yes.
Q. How did you get there?
A. By car.
Q. How did it come about that you got a car and went to Broad [35] Street?
A. I picked up the car at the unit office and told to go to the Detective Bureau and pick up Ruvio and come back to the office.
Q. Was anything said to you as to why you were to do that?
A. No, sir.
Q. You did come down to police headquarters from the Academy with your car?
A. Excuse me, I did or didn't?
Q. Did.
A. Yes, sir.
Q. What time did you get to police headquarters?
A. I don't know 7:30, quarter after seven.
Q. And at that time, that time you picked up Mickelson or plainclothesman Mickelson and who else?
A. Ruvio.
Q. What directions, if any, were you given at that point by either Ruvio or Mickelson?
A. They said let's go by Broad Street and see if Dunaway is home.
Q. Was that the only conversation you had about what you were going to do that morning?
A. No, they said they were going to pick him up.
[36] Q. Did they tell you they had been looking for him all night long?
A. Yes, sir, they said they had been there before.
Q. Did they tell you whether or not they had instructions to pick them up from Lieutenant Fantigrossi?
A. No, they said they were going to pick him up if he was there.
Q. Did you discuss how he was going to be picked up?
A. I assumed just pick him up.

Q. Well, was there any particular plan discussed as to who would do what and how you would execute the picking him up?
A. No.
Q. The only conversation you had from police headquarters from Broad Street was that you were going to pick him up, is that correct?
A. I imagine there was another conversation.
Q. You mean concerning this case?
A. Yes, sir.
Q. That is all that was said?
A. More or less.
Q. You all were armed?
A. Yes, sir.
Q. You had—who was driving?
[37] A. I drove down.
Q. And Mickelson and Ruvio, I take it one was in the front and one in the back seat?
A. Yes.
Q. Now, there came a time, then, you got to Broad Street, is that correct?
A. Yes, sir.
Q. Do you remember the address at Broad Street?
A. Not the street number, no.
Q. What did you do when you arrived at Broad Street?
A. We left the vehicle.
Q. No, what did you do, you left the vehicle?
A. And I stood in the driveway of the house by the sidewalk and Mickelson and Ruvio went to the door and entered the house.
Q. Were you talking about Broad Street?
A. Yes, sir.
Q. Now, you were on Broad Street. This was this house between what street, if you recall?
A. Near Walnut Street.
Q. Very far away from Walnut?
A. No, sir, not that far.

Q. And from where you were standing on Broad Street address, on [38] the driveway, could you see Walnut?
A. Parts of it, yes.
Q. Was there no obstruction between you and Walnut?
A. I could see the intersection. That is about it.
Q. Now, how long was Ruvio and Mickelson in the Broad Street?
A. I would say no more than five minutes.
Q. Now, during that five minutes you were in the driveway, is that correct?
A. At the driveway and sidewalk, yes.
Q. Was there any reason why you were outside while the other two were in?
A. Yes, I was just stationed outside to watch for anything unusual.
Q. Was this pursuant to some instruction?
A. No, sir.
Q. Well, did you all leave the car on your own? You decided not to go in and to stay outside?
A. The only thing I say to them, I will stay outside and you two go in.
Q. Were you in charge of the operation?
A. No, sir.
Q. Who was in charge of the operation?
A. Mickelson and Ruvio's investigation, as far as I was [39] concerned.
Q. They didn't tell you to stay outside?
A. No, sir.
Q. You decided you were going to stay outside yourself?
A. Yes.
Q. This was for if something unusual might happen, is that correct?
A. Yes.
Q. What were you thinking in terms of unusual?
A. Sometimes when police go to houses, people do strange things. They leave by windows and jump out of second story windows.
MR. SPIRES: I could see the direction which this cross-examination is leading and I would be willing, if

Mr. Crimi agrees, to stipulate that Detective Ruvio and Luciano and Mickelson went looking for Dunaway on the morning of August 11, 1971 with the intention of taking him into custody physically, if that was necessary and bringing him to the Public Safety Building.
THE COURT: Is that agreeable?
MR. CRIMI: I will take the stipulation, I don't want to curtail my cross-examination.
THE COURT: Very well. Proceed.
40] Q. In other words, you were there to make sure that Dunaway didn't get away, is that correct?
A. Yes, sir, if need be.
Q. What were you prepared to do in the event he tried to get away?
A. Stop him.
Q. Were you prepared to use any physical force, if necessary?
A. That is a tough question. If physical force was used against me, probably yes, but otherwise, no.
Q. Would you let him flee without trying to tackle him?
A. I probably would try and tackle him.
Q. You were intent in seizing him that morning, is that correct?
A. If need be, yes.
Q. Did you have a warrant of arrest on you?
A. No, sir, I did not.
Q. Any of the three have a warrant of arrest?
A. No, sir.
Q. Now, while you are standing on this driveway, what, if anything, did you observe?
A. A young lady come out of the house, out of the side door.
Q. What did you do then?
A. She walked by me and I said good morning. She walked down [41] Broad Street, turned the corner and went into a house on Walnut Street.
Q. Were you able to see her take that course on Broad Street all the way to Walnut Street?
A. Yes, sir.

Q. There was nothing obstructing your vision?
A. No, sir, I followed her.
Q. You saw her go into some house on Walnut Street, is that correct?
A. Yes, sir.
Q. Now, Walnut Street runs, it is a side street that comes into Broad Street, is that correct?
A. Yes, sir.
Q. I would say, correct me if I am wrong, it runs east and west?
A. No, I would say Walnut runs north and south.
Q. And Broad Street runs east and west?
A. Yes.
Q. So you would say that Walnut runs north and south and Broad Street runs east and west, is that correct?
A. More or less, yes.
Q. You followed this young lady down Broad Street. How far were you stationed in the driveway at the corner of Broad [42] and Walnut be?
A. 100 feet or less.
Q. And then did you follow her to the house on Walnut Street or did you stay at the corner and just note the house?
A. No, sir, I stayed at the corner and noted the house.
Q. Could you see the address where you were?
A. No.
Q. How did you fix that house in your mind?
A. By the color and location on the street.
Q. Is it a fair statement to say that is about the third house from the corner of Broad and Walnut?
A. I think it was.
Q. And these houses are cottage-type houses, is that correct?
A. They are small, yes, sir.
Q. They have a stoop about three stairs?
A. Yes, sir.
Q. And they are fenced in?
A. I don't remember being fenced in.
Q. And they have all small driveways?
A. Yes.

Q. Now, thereafter you did what, after you viewed this lady or young girl going toward this address?
A. When Detective Mickelson came out I asked him if he knew [43] who the young lady was who came outside and he said he didn't see any young lady. I informed him she came out the side door and went to a house on Walnut Street.
Q. All of you went to the house on Walnut?
A. No, sir.
Q. Who did?
A. Mickelson and myself.
Q. Did you walk down there together?
A. Yes, sir.
Q. What discussion did you have?
A. We thought maybe that is where Dunaway might be.
Q. Did you both go up to the doorway of the house on Walnut?
A. No, sir.
Q. What did you do and where did you go?
A. I stood down in the driveway.
Q. Now, in other words, you assumed the same position that you had before at Broad Street, you did the same thing on Walnut and you stayed outside the driveway?
A. Yes, sir.
Q. Was that for the same reason you avoided any possible flight or escape by Dunaway?
A. Yes, sir.
Q. And were you posted in the driveway?
[44] A. Right in the middle of the driveway, even with the front porch or door so I could see Detective Mickelson.
Q. Also, to make sure nobody left that house?
A. Yes.
Q. Such as Dunaway?
A. Yes, sir.
Q. Now, correct me if I am wrong. That is a small driveway, is it not?
MR. SPIRES: I object.
MR. CRIMI: Strike that.
Q. How wide would you say that driveway is?
A. I really don't know. I couldn't tell you in feet.

Q. Well, you have seen a lot of driveways, I take it, in your lifetime. Can't you estimate as to whether it was six foot wide or seven foot wide or eight foot wide?

A. I wouldn't estimate.

Q. From where you were positioned, how far were you from the stairs and door at 102 Walnut?

A. I don't really remember. The only thing I remember is I kept Detective Mickelson in sight, as far as feet or distance, I don't know.

Q. Were these small or large lots?

MR. SPIRES: I object to the form of the question.

[45] THE COURT: Sustained.

Q. Can you tell us how wide the lots upon which this house was built was?

A. No.

Q. You have no idea how far away were you from where you heard these so-called words of Mickelson?

A. No, sir.

Q. Absolutely no idea?

A. Not absolutely no idea, I can't testify, six feet. I don't remember how far it was.

Q. There is nothing I could do to refresh your recollection at this point?

A. I don't think so.

Q. At any rate, from that standpoint, what did you observe, if anything?

A. I observed Detective Mickelson knock on the door.

Q. Did you hear the knock?

A. Yes, sir.

Q. You heard the knock?

A. Yes, sir.

Q. And what else did you observe, if anything?

A. I heard Mickelson say, "Axlerod or Dunway."

Q. Well, did you observe the door being opened?

[46] A. No.

Q. Did you observe Mr. Dunaway?

A. Not at that time, no.

Q. Did you observe anybody else at the doorway at that time?

A. No.

Q. So, you are, if we may call it, an observation, all that you experienced at that time was hearing Mickelson saying that, Dunaway or Axlerod?

A. Yes, sir.

Q. Did you observe Mr. Mickelson with a picture of Dunaway in his hand?

A. No, sir.

Q. Did you see a picture of Dunaway before that?

A. I don't think so, no, I didn't.

Q. There wasn't a picture at all that was shown to you or anybody else in the car on the way down to Broad Street?

A. I never saw a picture, if there was one, no, sir.

Q. Never saw one in anyone's possession?

A. No, sir, not that they showed me.

Q. All right. You didn't see Dunaway? All you heard was Mickelson say Dunaway and Dunaway or Axlerod?

A. Yes.

Q. I don't know whether you understand, whether he said both [47] of those or I can't remember whether he said Dunaway or whether he said Axlerod.

A. He said both of the names, Axlerod was the nickname. Dunaway was the last.

Q. Exactly what did you hear?

A. Axlerod or Dunaway.

Q. Did you hear the word "or"?

A. No, I heard Axlerod and Dunaway.

Q. You heard two words, Axlerod, Dunaway?

A. Yes.

Q. Well, what did you observe after that?

A. Detective Mickelson waved me to the porch, like a gesture.

Q. Did he say anything at all?

A. No.

Q. Nothing at all?

A. No, sir.

Q. Didn't say I got him?

A. No, sir.

Q. I found him?

A. No, sir, went like this—

Q. Just waved, didn't say a word?
A. No.
Q. What did you do then?
[48] A. I went to the bottom of the stairs.
Q. Did you do anything else?
A. That is when Mickelson told me.
Q. Where was Mickelson at this point, the top or the bottom of the stairs?
A. Still at the top.
Q. Where was Dunaway?
A. Coming out the door.
Q. What, if anything, did you observe concerning Mickelson and his hands? Did Mickelson have his hands on Dunaway in any way, form or fashion?
A. No, sir.
Q. Did he have him by the arm?
A. No, sir.
Q. You are positive?
A. Yes, sir.
Q. Did he have him by the belt?
A. No, sir.
Q. You were able to observe that?
A. Yes, sir.
Q. You say Dunaway came down the stairs, is that correct?
A. Yes, sir.
Q. Without any assistance from anyone, is that correct?
[49] A. Yes.
Q. When he got to the bottom, where were you? Did you put your hands on his arm or pants or anything?
A. No, sir, not that I can remember.
Q. You say you can't remember. Do you know or don't you know?
A. If I grabbed him? I think I would have remembered.
Q. What you are saying is you didn't touch him, is that correct?
A. My answer is, no, I don't remember.
Q. At any point did you observe Mr. Mickelson either holding him or in any way touching his arm or pants?

A. No, sir, not that I remember. He didn't touch him at all.
Q. So did you?
A. No, sir, not that I can remember.
Q. When you say you can't remember, is that possible that you did and can't remember?
A. No, sir, I think if I did I would remember.
Q. As far as Mickelson is concerned, he never—is it your testimony that from your observation, that at no time did you see him have a hold of Mr. Dunaway's arm or pants?
A. No, sir.
Q. Or belt? It is your testimony that all three of you, Dunaway and you and Mickelson were walking with your arms [50] free of each other?
A. Yes, sir.
Q. Now, you never heard Mickelson ask Mr. Dunaway whether he wanted to come downtown or not, is that correct?
A. No, sir.
Q. You never asked Dunaway whether he wanted to come downtown?
A. No, sir.
Q. What, if anything, did you do from the time that you came into the bottom of the steps to the time that Dunaway was brought to the police car?
A. I stayed with Detective Mickelson and Dunaway.
Q. Just walking beside them?
A. Yes, sir.
Q. At that point you would say Mr. Dunaway was free to go or wasn't he?
A. That decision would be made by Mickelson at that point, not me.
Q. There never was any discussion about that at all before you went to that house with Mickelson as to what you would do?
A. Regarding what?
Q. In case Dunaway didn't want to come down?
A. No, Mickelson would make that decision when the time came, [51] if need be.

In making their determination, the petitioner respectfully submits that the Appellate Division erroneously equated "voluntariness" (the Fifth Amendment threshold question) with factors relevant in determining free will (Fourth Amendment application of the exclusionary rule). Therefore, the Appellate Division basically found that the prosecution had met their burden of showing voluntariness, which merely indicates that they were only able to establish the "threshold requirement" as established in *Brown*. The two dissenters and the hearing court correctly found "there were insufficient intervening circumstances to attenuate the confession and remove the tainted effect of the arrest . . ." *People* v. *Dunaway, supra*, at 305 [Denman, J., concurring]. Petitioner will now show how "the facts in this case are almost on point with those in *Brown*." *People* v. *Dunaway, supra*, at 308 [Cardamone, J., dissenting].

In order to determine whether the primary taint of petitioner's arrest has been purged, the Court, in addition to finding that Miranda warnings were given, must consider the three factors outlined in *Brown*.

First, "the temporal proximity of the arrest and the confession." Dunaway was arrested and taken to police headquarters at approximately 9 A.M. (A-6). After making an oral confession, a stenographer was called and began recording a second statement at approximately 10:20 A.M. (A-9). The petitioner confessed within an hour and one-half after his being arrested at police headquarters. In *Brown*, the "first

statement was separated from his illegal arrest by less than two hours" *Brown* v. *Illinois, supra* at 604.

Secondly, we must examine "the presence of [any] intervening circumstances. "*Brown* v. *Illinois, supra*, at 604. Neither of the courts below have found nor has the prosecutor alleged that there were any intervening events of any significance. There was no lawful arraignment, release from custody or entry of counsel into the situation. Therefore, as in *Brown*, it can be accurately stated that "there was no intervening event of significance whatsoever." *Brown* v. *Illinois, supra*, at 604; emphasis added.

The third factor outlined by this Court in *Brown* was "the purpose and flagrancy of the official misconduct" *Brown* v. *Illinois, supra*, at 604. Clearly, in the case at bar, as in *Brown*, the detectives acknowledged that the purpose of the action was to bring in the petitioner "for questioning" in the hope that something might turn up. (A-56-57; 99). As detective Mickelson stated, ". . . he was in custody for an interview, an interrogation." (A-105). The apprehension of this petitioner was clearly investigatory "in design and execution." See, *Brown* v. *Illinois, supra*, at 605. The police action in this case constitutes flagrant official misconduct as well. The detectives knew they lacked sufficient information to obtain a warrent (A-60), so they acted without one (A-61). They went to a private dwelling prepared to make an arrest without a warrant when there were absolutely no exigent circumstances to justify that type of police action. It should

be noted that this Court has not retreated from its holdings which require police to use the warrant procedures whenever practicable. See *Terry* v. *Ohio, supra,* at 20 citing, *Katz* v. *United States,* 389 U.S. 347 (1967) *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964); *Chapman* v. *United States,* 365 U.S. 610 (1961). The fact that the police did not originally confront the petitioner with their weapons drawn is the only fact which tends to mitigate the flagrancy of their conduct. It should not be forgotten that the petitioner was a teenager who had never been questioned by the police before (A-37) and his request to find out why he had to go downtown to be questioned was answered with a response of "you'll find out when we get there" (A-100). It is only natural that he would be in fear of what would later happen to him. Further, the police in arresting petitioner without probable cause never advised him of his right not to go downtown with the police (A-81). See *Brown* v. *Illinois, supra,* at 601 footnote 6.

The flagrant official misconduct of the police in this case should not be condoned by this Court or any other court. The petitioner's Fourth Amendment rights were clearly violated and his subsequent confessions[2] and sketches should properly be excluded from evidence. *Brown* v. *Illinois, supra; Wong Sun* v. *United States, supra.*

Point II: Should This Court Choose To Differentiate Between "Arrest" And/Or "Seizure" And "Detention" And Should It Find That This Petitioner Was Not "Arrested," Then Did Petitioner's "Seizure For Purposes Of Detention And/Or Interrogation" Violate The Fourth Amendment.

Petitioner believes that his confrontation with the police in this case constituted an "arrest" (Point I(A)) and, therefore, his subsequent confession should be suppressed under this Court's holdings in *Brown* v. *Illinois, supra* and *Wong Sun* v. *United States, supra.* However, since it appears that there may be a technical distinction between "arrest" and "a seizure for purpose of detention and/or interrogation," petitioner will establish that his "arrest" or "seizure and detention" was in violation of the protections provided by the Fourth Amendment.

Petitioner would first state that an attempt to differentiate between "arrest" and a "seizure and deten-

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[2] As in *Brown,* petitioner made a subsequent stenographic statement to the police some hours after the first statement was completed. However, this second statement, although found to be voluntary at the February 24, 1972 Suppression Hearing, was not admitted into evidence at his trial. Further, there was absolutely no mention of this second statement at the August 3, 1976 Suppression Hearing nor was any evidence or argument offered to show its "attenuation." That statement was clearly and unmistakably a product or "fruit" of the first. See *Brown* v. *Illinois, supra,* at 605 Footnote 12.

tion" for purposes of lessening one's Fourth Amendment rights undeniably contradicts the premise and basic purpose of the Fourth Amendment; which is, the right of our citizens to be secured in their persons and homes. Clearly, the drafters of our constitution felt that a warrent should issue *only* when based on probable cause. *Katz* v. *United States,* 389 U.S. 347 (1967). This writer firmly believes that when the police action constitutes a "seizure" under the Fourth Amendment and when the police are acting without probable cause and without a warrant, it is not logical to believe that their "seizure" of a citizen without a warrant can be based on less than probable cause. *Terry* v. *Ohio, supra,* at 38 [Douglas, J., dissenting]. However, this Court has held to the contrary (See, *Terry* v. *Ohio,* 392 U.S. 1 (1968)) and petitioner respects that ruling, as well as the fact that "*Terry* begrudgingly accepted the necessity for creating an exception from the warrant requirement of the Fourth Amendment." *Adams* v. *Williams,* 407 U.S. 143, 154 [Marshall, J., dissenting].

In *Terry,* the Court stated, "[W]e thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." *Terry* v. *Ohio, supra,* at 19, footnote 16. Later, this Court went on to state, "The ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest, . . ., goes beyond our subsequent decisions in *Terry* v. *Ohio,* 392

U.S. 1 (1968) and *Sibron* v. *New York,* 392 U.S. 40 (1968)." *Morales* v. *New York,* 396 U.S. 102, 104-105 (1969)[3] Therefore, if Petitioner Dunaway was not "arrested" but "seized for purposes of detention and interrogation" the question left open by this Court in *Terry* must now be answered. To reiterate, may a person be "seized" on less than probable cause for purposes of detention and interrogation? The petitioner most respectfully submits that such police action violates the Fourth Amendment, especially under the facts of this case.

A: "Arrest" v. "Seizure and Detention and Interrogation"

When a citizen is apprehended or "seized" by the police and is "detained" by being placed in a police car and taken to police headquarters, he is clearly in the exact same position as one who is "arrested" by police. This writer honestly sees no reasonable basis which would allow for a rational distinction between

[3] It is interesting to note that the New York Court of Appeals persisted in reaching the same conclusion on the remand of that case by this Court (*People* v. *Morales,* 42 N.Y.2d 129 (1977)). However, that court also held, "Since the finding of the trial court [that the defendant *consented* to the police detention] is supported by the record, we are precluded from upsetting it [citations omitted]. Therefore, as an alternative basis for our holding in this case is that the defendant *consented* to the police detention." (*People* v. *Morales, supra,* at 138, emphasis added) No finding of *consent* has ever been made in this case.

the status of two people so situated. See, *Davis* v. *Mississippi*, 394 U.S. 721, 726-727 (1969). In *Davis*, the petitioner was "seized" and "detained" on two separate occasions; first, on December 3, 1965 and, a second time on December 12, 1965. The second detention lasted at least two days. Davis' fingerprints were taken by the police during each of the detentions. This Court held that both the December 12-14 *and* the December 3 detention violated Davis's Fourth Amemdent rights, despite the fact that the State argued that the December 3 detention was of a type which did not require probable cause (This case was decided after this Court's decision in *Terry* v. *Ohio, supra*). See, *Davis* v. *Mississippi, supra*, at 726. The Court answered that argument by stating:

> "... to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigative detentions' (footnote omitted). We made this explicit only last Term in *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968), when we rejected the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' ... *Davis* v. *Mississippi, supra*, at 726-727.

Petitioner Dunaway is aware of the fact that the police action in *Davis* was referred to as "dragnet" in nature (See, *Davis* v. *Mississippi, supra*, 728, Harlan, J., concurring). However, it is most important to note that the Court's holding involved a finding that Davis' rights were singularly violated. *Davis*, individually, was found to have been "seized" or "arrested" when he was taken to the police station on December 3 for fingerprinting. I am sure that Court was upset with the "dragnet" police operation, but the fact still remains that it was Davis' constitutional rights that were specifically violated by the police action.

Other situations can be envisioned which would result in a "seizure" and a less serious "detention for questioning" (i.e. questioning a person on the street in the setting outlined in *Terry*). See, *Terry* v. *Ohio, supra* at 34-35, White, J., concurring. However, since that factual setting is not before the Court in the case, it should suffice to say that regardless of the label attached to describe the citizen police confrontation, be it "arrest," "seizure," or "detention," the Fourth Amendment safeguards apply. *Terry* v. *Ohio, supra; Davis* v. *Mississippi, supra.*

B: "Reasonable Suspicion"

In affirming petitioner's judgment of conviction, the New York Court of Appeals ordered a limited

hearing in which the lower court was to determine whether probable cause existed for Dunaway's "detention" (*People* v. *Dunaway,* 38 N.Y.2d 812 (1975)). The trial court clearly found that there was no probable cause for petitioner's "arrest" (A-121). On appeal, in affirming the finding that probable cause did not exist, the Appellate Division for the first time found that the information the police had amounted to "reasonable suspicion" (*People* v. *Dunaway,* 61 A.D.2d 299, 302 (Fourth Department, 1978)). Petitioner strongly disagrees.

First, the information obtained from the first untested informer (Sparrow) was established as having been untrue. It was Sparrow's hearsay information that Cole and Irving were involved in the Tower of Pizza murder (A-51). Cole *denied* any involvement! Now Cole, while exonerating himself, relays multiple hearsay information that "BaBa" Adams and Irving were involved (A-52-53). The source of Cole's information (Hubert Adams) was incarcerated and available, yet the police made *no* effort to contact him. It is more than reasonable to assume that an individual involved in a homicide would try to exonerate himself and point the guilty finger at someone else. But in this case the police did not seek to substantiate Cole's information. They choose to apprehend Irving and to interrogate him.

Petitioner finds it hard to believe that such information constitutes "*reasonable* suspicion." In view of the fact that neither of the informers here were ever

even met by the police before they obtained the information and where the information given was an attempt by the provider to exculpate himself, it defies reasonableness to allow a seizure, such as the one in the case at bar. *Terry* v. *Ohio, supra,* at 21. Further, it is significant to note that no effort was made to establish the fact that other practical, alternative investigative techniques were exhausted. The "seizure," "detention" and "interrogation" of a citizen should not be tolerated on such pitiful information. This Court has appropriately noted, "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams* v. *Williams, supra,* at 147. The information in the case at bar clearly falls within that description.

C: Rationale For Terry Decision

In *Terry,* this Court was faced with the very serious task of balancing the rights of our citizens to be secure in their persons agianst the power of the police to "stop and frisk" suspicious persons *on the streets.* Faced with this vexatious task, this Court developed a "very narrow" exception to the Fourth Amendment's requirement of probable cause (See, *Adams* v. *Williams, supra,* at 161-162, Marshall, J., dissenting) and, in so doing, developed a "reasonableness standard." As the Court stated, ". . . the central inquiry under the Fourth Amendment [is] the reasonableness

in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry* v. *Ohio, supra,* at 19. This special standard had to be developed to accommodate the "on-the-spot observations of the officer on the beat" who "as a practical matter could not be subject to the warrant procedure." The factual context of *Terry* is obviously not present in the case of bar. The police here had ample opportunity to obtain a warrant. The reason they failed to obtain one was the fact they *knew* they did not have sufficient information to approach a court and obtain one (A-60). Clearly, that conduct has not been condoned by this Court which stated, "We do not retreat from our holdings that the police *must,* whenever practicable, obtain advance judicial approval of searches and *seizures* through the warrant procedure (citations omitted)." *Terry* v. *Ohio,* at 20; emphasis added.

The police action in Terry was found to have been reasonable because (1) the information obtained by the police was gathered while making observations "on the beat" (i.e. the information was fresh), (2) which needed to be acted upon immediately in view of the exigencies of the situation. (3) The "seizure" or confrontation took place on the street (4) for a reasonably brief period of time.

D: Application Of Terry "Reasonableness Standard" To The Facts Of This Case.

None of the factors which existed in *Terry* to justify the application of a "reasonableness standard" are

present in this case. First, the information obtained by the police was more than two months old and it was obtained more than four months after the incident. It was, therefore, stale. See, *Sgro* v. *United States,* 387 U.S. 206 (1932). Secondly, there was no immediate need for the police to "seize" Dunaway. They were not expecting him to flee nor was there any indication he might be leaving the area. Plainly stated, there was absolutely no exigent circumstance which justified obviating the warrant procedure. Third, the "seizure" of petitioner was to take place at his home, a place that has been highly protected by this Court (See, *Coolidge* v. *New Hampshire,* 403 U.S. 443, 474-478 (1971); *United States* v. *Watson,* 423 U.S. 411, 433, Stewart, J., concurring (1974); *Dorman* v. *United States,* 435 F2d 384, 390-391 (D.C. Cir. 1970)). This case does not present an "on the street" confrontation which would require immediate action. The police had ample opportunity to plan the method of petitioner's seizure as evidenced by Detective Luciano's actions of standing watch in petitioner's driveway in case someone tried to leave by the side door. Further, to apply a reasonableness standard to stationhouse detention for purposes of interrogation would be to overlook the "inherently intimidating" environment associated therewith. *Miranda* v. *Arizona, supra,* at 445-448. The officers' actions here speak only for one rational inference—they wanted the petitioner in their exclusive control, incommunicado, for purposes of interrogation. (See, *People* v. *Anderson,* 46 A.D.2d 140 (Fourth Department, 1974) affd. 42

N.Y.2d 35 (1977), where a Rochester youth was questioned by Rochester police for 19 hours until he confessd to a homicide and there was no probable cause for that detention). Lastly, petitioner respectfully submits that petitioner's detention was not "reasonably brief" under the standard developed in *Terry*. Here the petitioner was taken from a private dwelling, placed in a police car, driven downtown and interrogated. This confrontation lasted more than an hour and one-half. In *Terry*, the confrontation was found to be reasonable in that it lasted only minutes. It also appears that the original confrontation in *Davis* v. *Mississippi, supra*, was brief since it involved fingerprinting and apparently brief questioning.[4] Nonetheless, that "seizure" as well was found to have violated the Fourth Amendment.

Clearly, the police action in this case was not reasonable when viewed "in light of all the exigencies of the case" which is "a central element in the analysis of reasonableness," (See, *Terry* v. *Ohio, supra*, at 17-18 Footnote 15) since none existed.

In conclusion, the petitioner respectfully submits that in situations where the police "seize," "detain" and "interrogate" an individual *at police headquarters*, probable cause is required. Even if this Court was to determine otherwise, the police action must be reasonable in light of the factors enunciated by this

[4] See *Davis* v. *Mississippi, supra*, at 722, 728.

Court in *Terry*. Clearly, the police action in this case of "seizing and detaining" petitioner at police headquarters for interrogation on such a dearth of information should not be found to be reasonable, especially, in view of the other factors affecting reasonableness heretofore discussed.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner respectfully requests that the judgment below be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ Of Certiorari To The New York State Supreme Court, Appellate Division, Fourth Judicial Department

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

We adopt the preliminary matters in the Petitioner's brief titled: Opinions Below; Jurisdiction; Constitutional Provisions Involved.

Questions Presented

1. Was Dunaway seized, in the Fourth Amendment sense, when he agreed to go downtown for questioning.
2. If Dunaway was seized, was the seizure reasonable under all the circumstances.
3. Did the police conduct sufficiently taint the voluntary confession and render it excludable as the "fruit of the poisonous tree."

4. Should the exclusionary rule be invoked to deter the conduct of the police which was in good faith reliance on existing New York law.

Statement of the Case

Philip Argento (with his family) ran a small pizza restaurant in Rochester, New York. On Friday, March 26, 1971, business was slow, and Mr. Argento and his wife were alone in the store (T.M. 273). At about 10:00 p.m., two men came in, one with a gun under his arm. It was a sawed-off, double-barreled .12 gauge shotgun, wrapped with tape (T.M. 217, 275). The man with the gun shouted an obscenity at Carmailee Argento, who backed through the doorway into the kitchen to get her husband (T.M. 276).* One of the men went toward the cash register. The other man pointed the gun directly at both Mr. and Mrs. Argento from the kitchen doorway (T.M. 277). Mr. Argento, who was making pizza, stepped forward to see what was happening, and as he did he was shot in the head from a distance of inches (T.M. 278). Mr. Argento fell backwards and landed face down on the floor (T.M. 172). The left side of his head had been blown right off (T.M. 173, 316). Mrs. Argento did not see either of the men leave. She was looking at her husband (T.M. 278).

The Rochester Police Department conducted a thorough investigation of this murder. They were at the scene moments after the killing, secured the area and began interviewing prospective witnesses immediately. But the investigation was at a stalemate until August, when the police "got a break in the case." (T.M. 240, 242-43, 280).

On August 10, Detective Robert Mickelson spoke with one of his informants, O. J. Sparrow. Sparrow said that he had recently

*Mr. and Mrs. Argento lived in an apartment behind the restaurant with their daughter and Mr. Argento's mother. His brother lived across the street (T.M. 271).

been in jail and had heard about two men who might know about the shooting. One was James Cole. He did not know the other's last name, but his first name was Irving. Immediately after speaking with Sparrow, Mickelson called Detective Anthony Fantigrossi, who was in charge of the investigation. Fantigrossi had been at home, but came to his office immediately, interrogated Sparrow at length, and confirmed the information Sparrow had given Mickelson (A. 55). Sparrow knew what Irving looked like and identified his picture from a file of photographs. The picture was petitioner's, Irving Dunaway (A. 51, 53).

James Cole had indeed been in jail with Sparrow, and was still there. Fantigrossi interviewed him, and Cole convinced him that he, Cole, had nothing to do with the shooting (A. 52). But he did know something about it, and implicated Ronald Wallace Johnson, also known as Ba-Ba Adams. Johnson is the person who fired the shot that killed Philip Argento (A. 53). Cole also confirmed petitioner's involvement in the crime, even supplying his nickname, "Axelrod." Cole had received this information from Hubert Adams, who, he said, was Johnson's brother (A. 52-53).

Hubert Adams was in Elmira Correctional Facility (about 120 miles away) at the time, sentenced on another crime (A. 53, 58). Johnson was a juvenile (A. 56). Dunaway, the police learned, was in Rochester. Fantigrossi decided to try to talk with Dunaway.

About eight the next morning, Detectives Mickelson, Ruvio and Luciano went to Dunaway's house. Two of them knocked on the door and asked for him, but he was not home. While this was happening, Detective Luciano, waiting outside, had seen a young girl leave Dunaway's house and go to one about three houses away. Luciano had said "good morning" to her as she passed (A. 73). When Mickelson returned (Ruvio had stayed behind to make a telephone call), he and Luciano went to that house. Luciano stayed in the driveway while Mickelson knocked on the door.* A

*No one went inside (A. 76, 89).

man answered. Mickelson identified himself and asked if he was Axelrod Dunaway. The man said he was. Mickelson told him that the police wanted to talk to him and would he come downtown. Dunaway said yes, he would (T.M. 247, A. 89, 90). The girl Luciano had seen was Dunaway's sister. She had told Dunaway that the police were at his house and wanted to question him. Dunaway was on his way to speak with the police when Mickelson knocked on the door (A. 32, 87).

Mickelson motioned to Luciano and they all walked back to the car, an unmarked sedan. Dunaway did not try to run away. The officers did not abuse Mr. Dunaway (A. 64, 67, 78, 90, 99, 101, 102).*

The ride downtown took approximately 30 minutes. On the way, Dunaway asked why he had to go downtown to be questioned. The detectives told him to wait and it would be explained when they got there. Dunaway did not object. There was no other conversation in the car (A. 81, 85).

They went to the Detective Bureau on the fourth floor of the Public Safety Building (A. 33). Dunaway met with Detective Francis Novitskey. Novitskey asked Dunaway his name and age (T.M. 300). He told him the police were investigating the homicide on Genesee Street (T.M. 282) and asked if Dunaway knew anything about it (T.M. 300). Dunaway said yes, and Novitskey then advised him of his Miranda rights.** Dunaway agreed to speak with the police about the shooting, implicating

*Dunaway claimed that the police touched him on the arm and grabbed him by the belt of his pants (A. 32, T.M. 390). The record is replete with examples of Dunaway deliberately making inaccurate and self-serving statements to the police. Many of these examples are admitted in the defendant's own testimony (*e.g.*, T.M. 393). Others were disbelieved by the trial court and Jury (T.M. 395, 554).

**Novitskey said that Dunaway's answer did not yet implicate him in the killing, "not to my satisfaction at that time, no." (T.M. 301). Novitskey did not formally arrest Dunaway until later.

himself in the crime. At about 10:20 a.m., Dunaway repeated his statement to a stenographer. That lasted about 25 minutes. He was then booked and formally charged (A. 6, 9, 10).

At about 10:00 p.m. that same evening, Dunaway asked to see Detective Novitskey again (A. 10, 22, 24). He told Novitskey that he wanted to "come clean and tell the whole truth." (A. 10). He was again advised of his Miranda rights (A. 24, 25, 10). He gave the police a further statement about his involvement in the crime. The conversation was very brief (A.25).

The police met with Dunaway the following morning. They again confirmed his understanding of his Miranda rights (A. 25). Dunaway repeated his expanded statement of the night before and it was recorded by a stenographer.

These statements were determined to be voluntary at a pretrial suppression hearing. The "first" statement, and evidence developed from it, were used against the defendant at trial. The later statement was not used at trial because of redaction problems. *Bruton v. United States*, 391 U.S. 123 (1968).

Summary of Argument

Petitioner claims that he was illegally "seized" and that his statements to the police, while concededly voluntary*, were nonetheless improperly admitted in evidence at his trial. Of course, the admissibility question arises only if the Court finds that Dunaway's Fourth Amendment freedoms were impermissibly diminished by the Rochester Police Department.

Resolution of this case requires determination of the nature of Dunaway's initial contact with the police on August 11, 1971. There appear to be only three options: (1) Dunaway was not "seized" at all; (2) or he was legally detained; (3) or he was unreasonably seized in violation of the Fourth Amendment.

We believe that the credible evidence in this case shows that Dunaway voluntarily consented to speak with the police on August 11, 1971. We also believe that the police were entitled to talk to Dunaway in their careful and good faith effort to solve a serious and baffling crime. Indeed, we submit that failure to have done so would have been gross incompetence by the police. Finally, we believe that the evidence obtained from and through Dunaway was properly admitted at trial: Dunaway's statements to the police were "sufficiently . . . act[s] of free will to purge the primary taint of any initial Fourth Amendment violation. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963); *Brown v. Illinois*, 422 U.S. 590, 602 (1975).

*There are no Fifth or Sixth Amendment issues on this appeal.

POINT ONE

Dunaway was not "seized" when he agreed to accompany the officers downtown.

"Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968). There is no constitutional prohibition barring the police from questioning a person who voluntarily agrees to speak with them. In fact, citizens are encouraged to cooperate voluntarily with police investigations. See, *e.g.*, *Terry v. Ohio*, *supra*, 392 U.S. at 11. See also, Point II, *infra*. To constitute a seizure cognizable by the Fourth Amendment, a person must be detained by the police against his will. *Cupp v. Murphy*, 412 U.S. 291, 294 (1973).

Historically, detention within the contemplation of the Fourth Amendment has been viewed as a consequence not simply of particular police conduct but also of its expectable impact on the mind of the person detained. See, *e.g.*, *Kelly v. United States*, 298 F.2d 310, 312 (D.C. Cir. 1961); *Coleman v. United States*, 295 F.2d 555, 563 (D.C. Cir. 1961), *cert. den.*, 369 U.S. 813 (1962). Therefore, whether a given set of events constitutes a seizure in the Constitutional sense requires analysis of two factors. The first — the conduct of the police — has two elements: their subjective intent and the objective manifestation of that intent observable to the citizen. The first of these is undisputed and need not detain us: the Rochester Police intended to compel Dunaway's company if necessary. But the credible evidence shows that it was never necessary for the police to reveal this intent objectively, and there is little reason to think that Dunaway was cognizant of its existence. See, *Hicks v. United States*, 382 F.2d 158, 161 (D.C. Cir. 1967); *United States v. Jones*, 352 F.Supp. 369, 377-78 (S.D. Ga. 1972), *affd.*, 481 F.2d 1402 (5th Cir. 1973).

The behavior of the police when they contacted Dunaway on August 11, 1971, was free from the "physical force or show of authority" which this Court has noted is necessary for the conclusion that a seizure has occurred. *Terry v. Ohio, supra,* 392 U.S. at 19, n. 16. The police testimony shows that a lone, plainclothes officer knocked on the door of a house where he thought Dunaway might be. When the defendant answered the door, the policeman identified himself and asked the man his name. Upon learning that this individual was the defendant, the detective asked him if he would come to police headquarters. The detective was then joined by his colleague, also in plainclothes, and they walked to an unmarked car and drove uneventfully downtown. No weapons were displayed at any time and Dunaway was not handcuffed. Each police officer testified that Dunaway was not touched, and there was no other force or hint of force.

Of course it has often been noted that any contact with citizens initiated by the police is in a sense "inherently" coercive. But "coercion" in the constitutional sense does not necessarily follow from questioning which has "coercive aspects." As the Court recently reaffirmed, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977). This is an important distinction, since without it voluntary cooperation by a guilty citizen with the police could never assist in the conviction of that person for the crime under investigation. By any objective standard, the officers' conduct, throughout, was neither coercive nor physically threatening.

The other side of this seizure analysis concerns the perceptions of the person contacted by the police. But the analysis does not depend upon what "the [subject] himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had

he been in the [subject's] shoes." *Coates v. United States,* 413 F.2d 371, 373 (D.C. Cir. 1969). See, *United States v. Wylie,* 569 F.2d 62, 68 (D.C. Cir. 1977).

It is difficult to believe that an innocent and reasonable citizen would have felt that his liberty was unduly restrained by the behavior of the Rochester Police in this case. True, there was a request for assistance from the police. But there was nothing in the police behavior to cause a reasonable and innocent citizen to fear forcible arrest had he declined the request. The evidence in the Record indicates that Dunaway himself did not feel the sort of apprehension at his contact with the police that would be required to support a finding that he was seized. According to the police testimony, he readily agreed to the request that he go downtown with the police. He knew when he agreed that the police wanted to question him. As a matter of fact, by his own testimony, he was on his way to go to the police for this purpose when Detective Mickelson knocked on the door. The only credible evidence of any reluctance on Dunaway's part was the elliptical conversation in the car. Even here Dunaway did not object to waiting until he arrived at the police station for a full explanation of what the police wanted to ask him about.

This was not Dunaway's first contact with the criminal justice system. He had earlier been convicted of a weapons charge (T.M. 438, 439). It is an inescapable inference from the credible evidence that Dunaway knew that he was exposing himself to almost certain apprehension by going with the police. His actions, and his willingness voluntarily to confess upon questioning, support the view that Dunaway was not seized.[1]

[1]The intent of the police to compel Dunaway's company if necessary becomes relevant here, for the fact that they did not have to implement these intentions indicates that Dunaway showed no knowledge of them. This, in turn, supports the inference that Dunaway accompanied the police not because he thought he had to, but because he wanted to.

Footnote continued on next page—

POINT TWO

The questioning of Dunaway and the events preceding it were reasonable under the circumstances, and violated none of his rights.

The police decided to question Dunaway after they developed their only serious lead some four months after the murder. The police reasonably suspected that Dunaway was present during the crime (A. 125-26). Also the court below found that the police questioned Dunaway under "carefully controlled conditions which were ample to protect his Fifth and Sixth Amendment rights." (A. 126). Should the Court disagree that Dunaway consented to speak with the police, the next question is whether and to what extent the police may impose on a citizen whom they reasonably suspect possesses intimate knowledge about a serious and unsolved crime.[2]

Because the Fourth Amendment prohibits only unreasonable seizures, resolution of this issue requires a balancing of society's justifiable interest in solving serious crimes against a citizen's

—*Footnote continued from preceding page*

Examination of the entire trial transcript also supports this inference. Two relatively young men planned a robbery with the help of an older man. They took the gun, which was not theirs, and went to the Pizza Shop. In the excitement of the moment, the gun went off and Mr. Argento was shot and killed. The young man panicked, abandoned the robbery and the gun and ran out of the store. The older man threatened to do away with his accomplices if they talked. What started off as a "simple" robbery had escalated into a murder. This weighed heavily on Dunaway's mind, until the police arrived. Dunaway was relieved to finally get the matter off his conscience. Dunaway himself said later, when he asked to see the detectives for his "second" statement, that he wanted to "come clean and tell the whole truth." (A. 10).

[2]The Court has heretofore not specifically considered this issue. In *Morales v. New York*, 396 U.S. 102, 105-106 (1969), the issue was specifically reserved in view of the inadequacy of the record.

freedom from arbitrary and aggressive interference by the police. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).[3]

An individual is protected from interference by the police when he "harbor[s] a reasonable 'expectation of privacy'" *Terry v. Ohio*, 392 U.S. 1, 9 (1968).[4] "Only legitimate expectations of privacy are protected by the Constitution." *Rakas v. Illinois*, ____U.S.____, 98 S. Ct. 421, 434 (1978) (Powell, J., concurring).[5] Just as "the specific content and incidents of this right must be shaped by the context in which it is asserted," *Terry v. Ohio*, *supra* 392 U.S. at 9, the contours of an individual's justifiable expectation of privacy vary with the attendant circumstances.[6] Furthermore, "[l]egitimation of expectations of privacy must have a source outside of the Fourth Amendment, either by

[3]"[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camera v. Municipal Court*, 387 U.S. 523 (1967). Professor LaFave has written that "[i]f stationhouse detention is to be justified, it is under the *Camera-Terry* formula, which stresses the balancing of the intrusion against the need." 3 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.6(b) at 157 (1978).

[4]Quoting from *Katz v. United States*, 389, U.S. 347, 361 (1967) (Harlan, J., concurring).

[5]"Obviously, . . . , a 'legitimate' expectation of privacy by definition means more than a subjective expectation . . ." *Rakas v. Illinois, supra*, 99 S. Ct. at 430 n.. 12. "[I]t is not enough that an individual desired or anticipated that he would be free from governmental intrusion. Rather, for an expectation to deserve the protection of the Fourth Amendment, it must 'be one that society is prepared to recognize as reasonable.'" *Rakas v. Illinois, supra*, 99 S. Ct. at 435 (Powell, J., concurring) (quoting from *Katz v. United States, supra*, 389 U.S. at 361 (Harlan, J., concurring).

[6]"The ultimate question, therefore, is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances . . ." *Rakas v. Illinois, supra* 99 S. Ct. at 435 (Powell, J., concurring).

reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois, supra,* 99 S. Ct. at 431 n.12.

The intense and entirely justifiable public interest in law enforcement cannot be denied. In this case it significantly exceeded the general interest in having crimes solved. A brutal murder had remained unsolved for over four months despite diligent investigation. The case had received widespread media attention and the level of public interest was unusually high.[7] The fact that the police were stalemated in their investigation increased the community's tension and anxiety concerning the case. Furthemore, when the police acquired the information which connected Dunaway with the murder, they had no practical investigative alternatives but to question him.[8] In short, this was not a routine case. Rather, a particularly heinous crime had been committed which the police were under the "highest duty" to solve. See, *Watts v. Indiana,* 338 U.S. 49, 58 (1949) (Jackson, J., concurring and dissenting). The public need to question Dunaway was, therefore, most compelling.

Against this high degree of public interest in solving the crime and questioning Dunaway must be weighed the degree and kind of intrusion to which he was subjected. When he met the police, Dunaway's sister had already informed him that they wished to question him. Dunaway was leaving to meet them as the police arrived at the door. The record contains virtually no dispute

[7]The record of the jury selection is replete with references to the high level of public interest in the case. (T.M. 117, 146, 151-52, 157-58, 170-71, 189, 194, 196-*et seq.*)

[8]The dissent below (A. 131) and the A.C.L.U. suggest that the police should first have talked to Hubert Adams. But this begs the question. Irrespective of what Adams might have said, the police still had to talk to Dunaway. Of course, if the police had talked first to the other perpetrator, "Ra-Ba" Adams (as the dissent below suggests), then the same constitutional issues may have been raised by a petitioner with a different name.

concerning the nature of the detention. As Dunaway himself testified, the police were polite, otherwise non-abusive and did not threaten or cajole him in any manner. He waived his Fifth and Sixth Amendment rights after proper warning and confessed about 20 minutes after he arrived at the Public Safety Building (A. 9). Dunaway also testified that he gave the statement voluntarily (A. 41), and spoke "willingly to the police." (T.M. 417) Viewed in its worst light, Dunaway was "detained" for a brief time and under carefully controlled and non-abusive conditions which amply protected his Fifth and Sixth Amendment rights.[9]

Moreover, the police had justifiable reason to question Dunaway. An informant, known to the police, told them that while in jail he had learned from a fellow inmate, James Cole, that Dunaway and another were responsible for the shooting. The informant picked Dunaway's picture from a group of mugshots. The police interviewed Cole at the jail and verified the informant's information. After four months, this was the only lead the police had, and it certainly cast reasonable suspicion upon Dunaway. See, *Terry v. Ohio, supra,* 392 U.S. at 20-22.

The fact that the police were reasonably suspicious is important because it demonstrates that Dunaway was not arbitrarily seized as part of a "lawless dragnet detention." *Cf. Davis v. Mississippi,* 394 U.S. 721 (1969).[10] The police did not

[9]The police did not use the occasion of the "seizure" as a pretext to achieve collateral objectives such as a full search incident to an arrest. *Cf., Brown v. Illinois, supra,* 422 U.S. at 611 (Powell, J., concurring); *United States v. Robinson,* 414 U.S. 218, 237-38 n. 2 (1973) (Powell, J., concurring). In fact, Dunaway was not searched at all. *Cf. Cupp v. Murphy,* 412 U.S. 291, 295 (1973).

[10]The quoted phrase comes from *United States v. Dionisio,* 410 U.S. 1, 11 (1973), which identifies the "dragnet" aspects of the police conduct in *Davis* as the "chief evil" struck down. *But see, id.,* at 39-40 (Marshall, J., dissenting).

scour the neighborhood committing "wholesale intrusions upon the personal security of our citizenry." *Id.*, 394 U.S. at 726.

The imposition which attends a brief and reasonable "detention" such as this one is a lesser intrusion than an arrest.[11] An arrest in New York is designed to take an accused into custody and to begin a criminal prosecution. Former New York Code Crim. Proc. §147.[12] It necessarily implies a future restraint of liberty until the charges are disposed. In addition, unlike the type of "detention" here, the "booking" which attends a formal arrest assures that the event will be recorded and that the individual will have an arrest record. Moreover, when the police picked him up, Dunaway could not reasonably have thought that he was being arrested for the murder.[13] Had

[11] "A requirement that a suspect appear briefly at the police station, to be sure, is in some respects more intrusive than a brief stop on the street, but it is nonetheless a lesser intrusion than an arrest, which is the initial stage of a criminal prosecution," 'is intended to vindicate society's interest in having its laws obeyed, and * * * is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.' 3 *LaFave, Search and Seizure: A Treatise on the Fourth Amendment* §9.6(b) at 155 (1978) (quoting from *Terry v. Ohio, supra*).

[12] New York's present Criminal Procedure Law, which did not carry forward the cited provision defining arrest, took effect after the events in this case. No substantive change was intended. See, Pitler, *New York Criminal Practice under the CPL* §2.17 at 111 (1972).

[13] Judge Kaufman once observed:

> "A layman, if asked if he had ever been arrested, would not be likely to describe situations where he had been stopped by a police officer, . . . , or even situations where his questioning had been continued at a police station, as arrests. The common conception of an arrest, like the technical definition, comprehends the formal charging with a crime." *United States v. Bonanno*, 180 F.Supp. 71, 78 (S.D.N.Y. 1960), *rev. on other grounds sub. nom., United States v. Bufalino*, 285 F.2d 408 (2nd Cir. 1960).

Of course, the fact that no formal arrest occurred is not *solely* determinative, but it is relevant to the degree of intrusion which must be weighed against the public need to investigate.

Dunaway said nothing or cleared himself, he would not have been arrested.[14]

Assessment of Dunaway's asserted right to be completely free from any official interference must be considered in light of the great public interest in a brutal murder case, the solution of which had eluded the police for over four months.

> [I]t is not easy to articulate offense-category limitations as a matter of Fourth Amendment interpretation. Yet it is important here, just as with the stopping of suspects on the street and the employment of roadblocks, that such limitations be developed. If station-house detention is to be justified, it is under the *Camera-Terry* formula, which stresses the balancing of the intrusion against the need. The need factor cannot be assessed in a sensible fashion without considering the magnitude of the offense under consideration; extraordinary procedures which might be justified in an attempt to solve a homicide, . . . , are not appropriate to determine whose fingerprints are on a bag of marijuana. 3 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.6 (b) at 156-57 (1978).

Of course, this does not mean that the Fourth Amendment is suspended merely because a crime is serious. But the privacy which deserves the protection of the Fourth Amendment is that which "society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The seriousness of this crime, and the intense public interest in its solution must be significant entries on the scales by which the

[14] For example, James Cole was not arrested. The police realized that the information they possessed was not sufficient to charge Dunaway with the crime. Even when Dunaway stated that he knew something of the crime, the police did not yet believe he was sufficiently implicated to charge him with its commission. (T.M. 301).

reasonableness of the police conduct is weighed,[15] as must the fact that the police lacked viable investigative alternatives.

The reasonableness of Dunaway's expectations of privacy must also be assessed against the historical duty citizens have to come forward with information about unsolved crimes. The Court has often recognized that this duty is deeply rooted in our traditions. See, *United States v. New York Telephone Company*, 434 U.S. 159, 175-76 n. 24 (1977).[16] This obligation has not often been considered where a witness turns out to be the defendant because the cases have usually arisen in the context of flagrant abuse and clear testimonial compulsion. See, *e.g. Brown v. Mississippi*, 297 U.S. 278 (1936); *Spano v. New York*, 360 U.S. 315 (1959).[17] But as Dunaway himself made clear, both at the suppression hearing and at trial, his confession was voluntary and he spoke willingly to the police.

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[15]"Would not the policy of the Fourth Amendment be ... served by an approach which determines the reasonableness of each investigative technique by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security ... of the individual involved." Barrett, *Personal Rights, Property Rights, and The Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 63.

[16]See also *Roviaro v. United States*, 353 U.S. 53, 59, (1957) ("obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials"); *Hamilton v. Regents*, 293 U.S. 245, 265 n. (1934) (Cardozo, J., concurring); *In Re Quarles and Butler*, 158 U.S. 532, 535 (1895) ("right and ... duty to communicate to the executive officers any information which he has of the commission of an offense against those laws"); *Matter of Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 16-17, 164 N.E. 726, 727 (1928) (Cardozo, Ch. J.) (and authorities cited therein).

[17]"The question whether it would be desirable for a suspect to participate as both a giver and receiver of information and, more particularly, to admit his crime if he is, in fact, guilty has had to be answered in the shadow of the third degree." Weinreb, *Denial of Justice* 149 (1977).

Society's expectation that citizens assist in crime investigation[18] helps shape its assessment of the reasonableness of an individual's asserted privacy rights. Nothing in the Fifth Amendment suggests that this is any less true when the individual turns out to be a defendant.[19] A person who is reasonably suspected of having knowledge of unsolved crime can have no justifiable expectation that the authorities may not question him about it. Where no issue of testimonial compulsion is present, the duty of a citizen to come forward with evidence of crime is relevant to the determination of the extent of his Fourth Amendment rights.[20]

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[18]This expectation is expressed in a number of statutes and rules. See, *e.g.*, Fed. Rules Crim. Proc. Rule 17; N.Y. Crim. Proc. Law, Art. 620; N.Y. Penal Law § 195.10.

[19]In *United States v. Dionisio*, 410 U.S. 1 (1973), the court held that a grand jury subpoena is not a Fourth Amendment "seizure" even though it may be inconvenient or burdensome. The burden imposed on the citizen is justified by the "historically grounded obligation of every person to appear and give his evidence before a grand jury ..." 410 U.S. at 9-10. Thus, "a 'grand jury subpoena to testify is not the kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied.' *Fraser v. United States*, 452 F.2d 616, 620 (7th Cir. 1971)." 410 U.S. at 10. We submit that the civic obligation we refer to should enter into the balance which determines the reasonableness of a seizure and, specifically, the extent of Dunaway's justifiable expectation of privacy.

[20]Saying that an individual *should* give information he possesses about an unsolved crime is not the same as saying that he is *compelled* to do so. This follows because the Fifth Amendment provides that the state may not impose a penalty for non-performance of that obligation when performance would mean self-incrimination. The state only acts improperly if it *compels* incriminating information from a person. Moreover, "compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." *Boyd v. United States*, 116 U.S. 616, 633 (1885). Likewise, the fact that Dunaway was not the subject of testimonial compulsion tends to show that he was not unreasonably seized in the Fourth Amendment sense.

Moreover, it should not be forgotten that this murder was a most disturbing intrusion into the lives of the citizens of Rochester, nor that community anxiety was heightened the longer the murder remained unsolved. Consequently, society should be less inclined to recognize as reasonable Dunaway's asserted right to be left absolutely alone, especially since questioning him (or another suspect with the same "right") was virtually the only chance of solving the murder.

Finally, the investigative procedures followed by the police in this case also "protect[s] those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered." *United States v. Vita*, 294 F.2d 524, 530 (2nd Cir. 1961). See, *United States v. Middleton*, 344 F.2d 78, 83 (2nd Cir. 1965). For example, the investigation in this case exculpated James Cole, who was implicated with Dunaway in the initial version of the incident that the police obtained. Before contacting Dunaway, the police questioned Cole and concluded the interview satisfied that he played no part in the killing. Nothing in the record suggests that the police did not believe that an interview with Dunaway might not end in the same way. While society has an interest in ascertaining the identity of those who commit crime, it also has an interest in ascertaining who is innocent among those suspected. Questioning is a most efficacious means of achieving these objectives especially when there are no viable investigative alternatives.[21] As the Second Circuit has held, "[i]f the purpose is

[21]"That thorough investigation is necessary for considered and effective administration of the criminal law is a truism which has its roots in the earliest codes of law. *See, e.g.*, Old Testament, Deuteronomy, 13:14, 19:18. It is only in the world of fiction that investigation can be conducted impersonally — that perceptive individuals such as Sherlock Holmes and Hercule Poirot can by some mysterious amalgam of intelligence and intuition solve the most puzzling of crimes and bring to justice the most devious and evasive of criminals. In the world as it is, face-to-face interrogation is the most useful tool in the discovery and prosecution of law breakers." *United States v. Vita*, 294 F.2d 524, 532 (2nd Cir. 1961); See generally, *Collins v. Beto*, 348 F.2d 823, 836 (5th Cir. 1965) (Friendly, J., concurring).

investigatory and not simply to keep the accused in custody until he confesses, if the police have good reason to believe that the suspect must be questioned further in order to determine whether he or any other person ought to be arrested, detention for a reasonable period of time is permissible and any confession obtained during it is admissible." *United States v. Vita, supra*, 294 F.2d at 533.

In short, Dunaway's justifiable and reasonable expectation of privacy, his asserted right to be entirely free from the intrusion visited upon him on the morning of August 11, 1971, was subordinate to society's imperative to solve the murder. The police were reasonable, in the Fourth Amendment sense, by briefly detaining Dunaway for questioning under carefully controlled conditions which protected his Fifth and Sixth Amendment rights.

Members of the Court have recognized the need for, and reasonableness of, brief detention for questioning of those persons the police reasonably suspect have knowledge of crime. In *Watts v. Indiana*, 338 U.S. 49, 58 (1949), Mr. Justice Jackson asserted in a case much like this one that custodial questioning on less than probable cause is sometimes indispensible.[22]

> In each case police were confronted with one or more brutal murders which the authorities were under the

[22]As the following excerpt demonstrates, Mr. Justice Jackson was most sensitive to Fourth Amendment concerns.

> "These [Fourth Amendment] rights, I protest, are not mere second class rights but belong in the catalog of indispensible freedoms. Among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

> highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer.
>
> In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him.
>
> • • •
>
> [N]o one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for . . . society . . .
>
> • • •
>
> I doubt very much if [the Constitution and Bill of Rights] require us to hold that the state may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does [sic], the people of this country must discipline themselves to seeing their police stand by helplessly while those [accurately] suspected of murder prowl about unmolested. *Id.*, 332 U.S. at 58, 61-62 (Jackson, J., concurring and dissenting) (emphasis in original).

Later, on the day *Mapp v. Ohio*, 367 U.S. 643 (1961) was decided, Mr. Justice Frankfurter recognized the need for custodial questioning on less than probable cause.

> The occasion which in December 1956 confronted the Connecticut State Police with two corpses and an infant as their sole informants to a crime of community-disturbing violence is not a rare one. Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains — if police investigation is not to be balked before it has fairly begun — but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

> The questions which these suspected witnesses are asked may serve to clear them. They may serve, directly or indirectly, to lead the police to other suspects than the persons questioned. Or they may become the means by which the persons questioned are themselves made to furnish proofs which will eventually send them to prison or death. In any event, whatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths. *Culombe v. Connecticut*, 367 U.S. 568, 570-71 (1961).

The questioning of Dunaway was thus justified by "the overwhelming public interest and the plain unvarnished fact that without such power society would often find itself helpless to solve crimes and protect its members." *United States v. Vita, supra*, 294 F.2d at 534. Because the murder was unwitnessed (except by the victim's wife who could remember very little) and the police had no viable investigative alternatives, failure to question Dunaway would have been, as Judge Denman in the court below stated, "contrary to responsible police conduct." (A. 128).

New York's rule permitting brief detention for questioning of people reasonably suspected of possessing knowledge of serious crime does not give the police "broad and unlimited discretion." *Cf. United States v. Brignoni-Ponce, supra*, 422 U.S. at 882. Under the Court of Appeals ruling in *People v. Morales*, 42 N.Y.2d 129 (1977), the police must justify their conduct with a clear showing of need under specific circumstances warranting the intrusion. Moreover, the manner and length of questioning must conform to rigid standards of reasonableness and conformance with Fifth and Sixth Amendment safeguards, which were met in this case.

Therefore, sanctioning of the behavior of the police in this case would not mean an abandonment of effective judicial super-

vision of police conduct in investigations of this nature. *Cf. Pennsylvania v. Mimms*, 434 U.S. 106, 121-22 (1977) (Stevens, J., dissenting). The New York Courts have demonstrated a willingness to closely scrutinize these types of investigations and carefully test them for reasonableness. See *e.g., People v. Morales, supra; People v. Kocik*, 63 A.D.2d 230 (4th Dept. 1978) (striking down a purported detention for questioning as unnecessary and arbitrary).[23] As Mr. Justice Frankfurter stated in *McNabb v. United States*, 318 U.S. 332 (1943):

> [R]eview by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. (318 U.S. at 340) (quoted and approved in *Cupp. v. Naughten*, 414 U.S. 141, 149 (1973).

Where the state courts do not abdicate their responsibility to ensure the protections of the Constitution, their judgment as to the procedures appropriate for vindication of these rights is entitled to deference.[24]

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[23]The Second Circuit recognized that judicial supervision is adequate to police detention for questioning. "[T]he possibility that powers given to law enforcement officers may be abused does not require government agents to be left powerless to make reasonable inquiry. The reasonableness of their behavior may be assured by close judicial supervision of the methods used." *United States v. Vita, supra*, 294 F.2d at 530-31.

[24]Petitioner suggests that even if a detention of the kind involved in this case is permissible in certain limited instances, the police must first obtain a warrant. But the question of the need for a warrant for detentions on reasonable suspicion is not fairly presented in this case. There was no authority, either in New York law or in federal law (see, *United States v. Vita, supra*), which would have alerted the police that a warrant procedure was available. Moreover, the Court has never held that a warrant is essential to effect an arrest on probable cause, even when no exigent circumstances are present. See, *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Watson*, 423 U.S. 411 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975).

POINT THREE

Dunaway's statements and the resultant evidence were properly admitted at trial; by any measure, the supposed taint was insufficient to require exclusion.

Evidence obtained after an unauthorized arrest is often excluded at trial, because it is said to be the "fruit of the poisonous tree," or "tainted" by the Fourth Amendment violation. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Nardone v. United States* 308 U.S. 338 (1939). But the existence of an initial Fourth Amendment violation does not *per se* require suppression of evidence obtained thereafter, even if "it would not have come to light but for the illegal actions of the police." *Brown v. Illinois*, 422 U.S. 590, 603 (1975); *Wong Sun v. United States, supra*, 371 U.S. at 487-88. In *Brown*, the Court noted that "persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality." 422 U.S. at 603. In such a case the confession need not be suppressed because the "taint" of the initial illegality has been sufficiently "purged." *Wong Sun v. United States, supra*, 371 U.S. at 486. Thus despite an initially illegal arrest, the prosecution is given an opportunity to show the evidence is nonetheless admissible. *Brown v. Illinois, supra*, 422 U.S. at 604; *Wong Sun v. United States, supra*, 371 U.S. at 486.

In Brown, the only evidence supporting the admissibility of statements obtained after an illegal arrest was that the defendant had been advised of his *Miranda* warnings at some point during his interrogation. On the facts of that case, the Court reversed Brown's conviction, noting that the Illinois Courts "were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest." *Brown v. Illinois, supra*, 422 U.S. at 605. The Court emphasized that the question whether a confession is admissible under *Wong Sun* "must be answered on the facts of each case",

and noted several factors which invalidated the *"per se"* assumption of the Illinois Supreme Court. *Brown v. Illinois, supra,* 422 U.S. at 603, 604-605. The facts in *Brown* were significantly different from the facts in this case, and we submit that Dunaway's statements were properly received in evidence under the *Wong Sun* standards.

While perhaps not dispositive, the nature and extent of the protections given Dunaway's Fifth and Sixth Amendment rights are important considerations on the issue of admissibility of his statements. *Brown v. Illinois, supra,* 422 U.S. at 603. In *Brown,* the defendant had been questioned about the murder before being told of his *Miranda* rights. 422 U.S. at 593-94. In Dunaway, there was virtually no conversation between the defendant and the police (about anything) until Dunaway was carefully advised of his *Miranda* warnings. Dunaway was given his *Miranda* rights the moment he acknowledged knowing about the crime. As Detective Novitskey testified, "[w]e have to let him know [what] we are going to talk about . . . so he can know whether to waive his rights." (A. 19).

Moreover, the police in Dunaway did not use the *Miranda* warnings in the "talismanic" manner that concerned the Court in *Brown.* 422 U.S. at 603. Detective Novitskey testified that he did not merely "read the guy his rights" from a "rights card" but advised Dunaway of his *Miranda* rights from memory, speaking much slower than he did when he was asked at the *Huntley* Hearing [25] to recite the rights for defense counsel (A. 16-17). Immediately after advising Dunaway of his *Miranda* rights, Novitskey asked Dunaway if he understood. Dunaway acknowledged that he did. Novitskey then asked if Dunaway would be willing to talk to him without a lawyer, and Dunaway

[25]See, *People v. Huntley,* 15 N.Y.2d 72 (1965), which is New York's procedural response to *Jackson v. Denno,* 378 U.S. 368 (1964). *Cf.* 18 U.S.C. §3501.

said he would (A. 8, 18). Dunaway's understanding of his rights was reaffirmed at each contact between him and the police (A. 6, 9, 10, 24-25). Dunaway himself testified (twice) that he was not abused or coerced by the police and that he spoke with them willingly and voluntarily (A. 41; T.M. 417). The trial court found that Dunaway's statements to the police were "entirely voluntary," and that finding was not disturbed in the subsequent history of the case (A. 43).[26]

While we recongize that merely advising a person of his *Miranda* rights will not always purge the taint of an illegal arrest, we submit that these facts show that Dunaway's Fifth and Sixth Amendment rights were scrupulously protected by the police in this case. And, further, there can be no better proof of the "degree of free will exercised by the witness" than the witness's own words. *United States v. Ceccolini,* 435 U.S. 268, 276 (1978). See, *Brown v. Illinois, supra,* 422 U.S. at 610 (Powell, J. concurring). In short, we believe that the overwhelming proof that Dunaway's statements were voluntary is an important consideration supporting our position that the evidence was properly received at trial.[27]

[26]Additionally, the trial court found that "Dunaway intelligently understood the [*Miranda*] warnings and knowingly expressed his waiver of his Constitutional rights . . . [The statements] were knowingly made and were made with the knowledge of the so-called *Miranda* rights." (A. 43). After the post-conviction hearing, the trial court reaffirmed that there was "no question that the inculpatory statements and sketches made by the defendant were voluntary . . . and that there was full compliance with the mandate of Miranda . . ." (A. 117).

[27]The majority at the Appellate Division noted that "[d]efendant's testimony that he was never threatened or abused by the police and that the statements he made to them were voluntary, along with the police testimony concerning the fact that defendant was given his *Miranda* rights, lend strong support for the conclusion that defendant's confessions were the product of his free will and that the police conduct here, subsequent to defendant's initial detention, was highly protective of defendant's Fifth and Sixth Amendment rights." (A. 127).

Additionally, we submit that the "taint" created by the police conduct in this case was *de minimus*, at most. See, Points I and II, *supra*. Therefore the Court should require very little additional proof of voluntariness beyond the Fifth and Sixth Amendment requirements. As Mr. Justice Powell has observed, "the point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of that taint". *Brown v. Illinois, supra*, 422 U.S. at 609 (concurring opinion).

In *Brown*, the Court noted several additional considerations which were important to the question of the admissibility of the confession obtained in that case. Of particular relevance were the "purpose and flagrancy of the official misconduct." *Brown v. Illinois, supra*, 422 U.S. at 604. A comparison of the facts in *Brown* with those in the present case is most instructive on these two points.

In *Brown*, the defendant was arrested at gun point, searched and accused of a murder with hardly a scintilla of evidence casting suspicion upon him. See, *Brown v. Illinois, supra*, 422 U.S. at 592. The situation was different with Dunaway. The details of the purpose for questioning Dunaway are explored in Point II, *supra;* suffice here to say that the police wanted to talk to the only solid lead they had obtained in over four months on a most intolerable and brutal murder.

Furthermore, there simply was no flagrant violation of Dunaway's Fourth Amendment rights. Unlike *Brown*, Dunaway was not confronted by apprehension at gun point, body searches, handcuffs, questioning before *Miranda* rights, obvious shows of force, lengthy initial questioning, asportation with the police for further investigation, or formal arrest and accusation. 422 U.S. at 592-93. On the contrary, the police here did not use the "seizure" as a calculated effort "to cause surprise, fright and confusion." *Brown v. Illinois, supra*, 422 U.S. at 605. Dunaway knew that the police were looking for him for questioning, and in

fact he was on his way to meet them for this purpose when they arrived (A. 32, 87). If the considerations set forth in Point I, *supra*, fall short of establishing that Dunaway consented to be questioned by the police, they are strong evidence nonetheless on the lack of flagrancy or coercion in Dunaway's contact with the police.

The flagrancy of the police behavior in *Brown* had another important facet not present in Dunaway. In *Brown* the "impropriety of the arrest was obvious[ly]" in violation of established Fourth Amendment principles. 422 U.S. at 605. The police in *Brown* forcefully and formally arrested the defendant and charged him with a crime based on virtually no evidence, let alone probable cause. By contrast, the Rochester police were acting lawfully under the existing law of New York. *People v. Morales*, 22 N.Y.2d 55 (1968). The questioning of Dunaway was based on "reasonable suspicion," occurred for a "reasonable and brief period of time," and was conducted "under carefully controlled conditions protecting his Fifth and Sixth Amendment rights." 22 N.Y.2d at 64. See Point II, *supra*. The Rochester police thought the procedure they were following was in accord with established principles.[28]

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[28]Thus, this was not a situation in which the police "knew or should have known" that their behavior was unconstitutional. *Brown v. Illinois, supra*, 422 U.S. at 606 (White, J., concurring).

The testimony of the detective in charge of the investigation fully establishes his good faith:

> Q. You're allegedly saying that your information was sufficient to physically pick up a suspect and bring him down to headquarters?
>
> A. I wouldn't do it any other way, counselor.
>
> • • •
>
> A. I think I had probable cause to bring him in and pick him up. I doubt if I had probable cause to charge him.

Footnote continued on next page—

In discussing the flagrancy of the police behavior in *Brown*, the Court cited several lower Federal Court cases. 422 U.S. at 604, n.9. one of these was remarkably similar to the situation in Dunaway. In *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971), the police arrested an individual under a vagrancy statute. After the arrest, the police obtained a statement from the defendant which was admitted into evidence at trial on other charges. The vagrancy statute was later overturned as unconstitutional, but the Court held that the confession was properly admitted into evidence since the defendant "was detained and charged *in good faith reliance on an ordinance not yet held invalid.*" 445 F.2d at 289-290 (emphasis supplied).

This analysis is consistent with the policies of the exclusionary rule, and shows why it would be inappropriate to invoke that rule on behalf of the defendant in this case. See, *Stone v. Powell*, 428 U.S. 465, 489, n.26.[29] The exclusionary rule rests on two major premises, both entirely salutory. The initial justification

—*Footnote continued from preceding page*

> Q. You differentiated between probable cause to arrest a person and probable cause to charge a person?
>
> A. Right, counselor.
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> • • •
>
> A. Probable cause to obtain a warrant, you must have enough information to substantiate a charge. In probable cause of picking up a man for questioning, which is done all the time based on information, this is done also.
>
> • • •
>
> A. That is to bring him in. I think I have that right as a police officer. If I haven't, I just found out. (A. 61).

[29]"The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown v. Illinois, supra*, 422 U.S. at 609 (Powell, J., concurring).

of the rule rested on the so-called "imperative of judicial integrity." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).[30] The courts should not become accessories to violations of the Constitution.

More recently, however, the Court has emphasized a deterrent rationale for the exclusionary rule. The primary purpose of the exclusionary rule is "to compel respect for the Constitution . . . in the only effectively available way — by removing the incentive to disobey it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). In fact, the Court has recently suggested that deterring Constitutional violations by the police is the "sole" purpose of exclusion.[31]

As a practical matter, the two policies coalesce and the inquiry into whether exclusion serves the one purpose or the other is "essentially the same." *United States v. Janis*, 428 U.S. 433, 459 n.35 (1976). *United States v. Peltier*, 422 U.S. 531, 538 (1975).[32] As the Court noted in *Janis*, the "imperative of judicial integrity" does not require in all instances that evidence illegally obtained may not be admissible in a criminal prosecution (428 U.S. at 458, n.35). This follows from the Court's approval of the use of evidence obtained in violation of the Fourth Amendment where the defendant fails to object to its admission and where the

[30]Nothing in *Weeks v. United States*, 232 U.S. 383 (1914), which announced the federal rule of exclusion can be read as setting forth a deterrent rationale for the exclusionary rule. See, Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. Ill. L. F. 518, 536-37.

[31]"The Court, however, has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.' *United States v. Calandra*, 414 U.S. 338, 347 (1974)." *United States v. Janis*, 428 U.S. 433, 446 (1976).

[32]"The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment." *United States v. Janis, supra*, 428 U.S. at 458 n. 35.

defendant lacks "standing" to challenge the police conduct. *Rakas v. Illinois*, ____U.S.____99 S. Ct. 421, 425 at n.3 (1978); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969). See generally, *Stone v. Powell, supra*, 428 U.S. at 485-86; *United States v. Janis, supra*, 428 U.S. at 458, n.35; *United States v. Calandra*, 414 U.S. 338, 348 (1974).

When police behavior is particularly intrusive and willfully violative of an individual's Fourth Amendment freedoms, the exclusionary rule is appropriately invoked, since suppression deters "future unlawful police conduct." *United States v. Calandra, supra*, 414 U.S. at 347. This was the case in *Brown*, where the police obviously knew that their conduct was improper. (422 U.S. at 605). Indeed, most of the decisions of this court pertaining to the exclusionary rule have turned upon an analysis of what might be termed flagrant police conduct. See, e.g., *Stone v. Powell, supra; United States v. Janis, supra; United States v. Peltier, supra; Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Calandra, supra*. See also, *Stevens v. Wilson*, 434 F.2d 867 (10th Cir. 1976); *United States v. Edmons*, 432 F.2d 577 (2nd Cir. 1970).

But "where the official action was pursued in complete good faith, . . . , the deterrence rationale loses much of its force." *Michigan v. Tucker, supra*, 417 U.S. at 447.[33] The Rochester police were acting in complete good faith and a decision of their state's highest court gave them reasonable grounds for their good faith belief. Egregious police conduct involving willful and flagrant violations of citizens' constitutional freedoms is not present in the instant case. Instead, the Record is free of any

[33]Furthermore, "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." *United States v. Peltier, supra*, 422 U.S. at 437-38.

showing of intentional misconduct by the police, and the facts show conscientious and experienced police officers exercising their duties in good faith and with exemplary regard for the rights of a citizen suspected of a crime.

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right," *Michigan v. Tucker, supra*, 417 U.S. at 447. It is difficult to understand why the exclusionary rule should apply to cases, such as this one, in which that assumption is invalid. Accurate and reliable evidence, voluntarily given by a defendant after a "technical" and good faith violation of the Fourth Amendment should not be excluded. *Brown v. Illinois, supra*, 422 U.S. at 610-611 (Powell, J., concurring).[34] This is especially true in this case, where there is no question that the defendant's Fifth and Sixth Amendment rights were scrupulously protected during his contact with the police. See, *Brown v. Illinois, supra*, 422 U.S. at 611-612 (Powell, J., concurring).

Should this Court overrule *Morales*, then of course, it may also be required to find that Dunaway's initial contact with the police was illegal. But if such is the case it is difficult to imagine a more clear-cut instance of the police behaving "in the good-faith belief that [their] conduct comported with existing law and having reasonable grounds for this belief." *Stone v. Powell, supra*, 428 U.S. at 538 (White, J., dissenting).

In addition to the good faith nature of the police conduct, the high degree of voluntariness of the challenged confession (see,

[34]This is the view of the New York Court of Appeals, which wrote that "[t]he controlling consideration for determining the admissibility of 'verbal' evidence obtained pursuant to claimed illegal police conduct is whether law enforcement officers acted in good faith and with a fair basis for belief that probable cause existed for an arrest." *People v. Martinez*, 37 N.Y.2d 662 (1975).

Point II B, supra) also serves to reduce the efficacy of the exclusionary rule in this case. The "*degree* of free will exercised by the witness is . . . [r]elevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application." *United States v. Ceccolini, supra,* 435 U.S. at 276.[35] The alleged illegality which provided the occasion for the initial contact between Dunaway and the police did not, as it very often will not in cases of this nature, "play any meaningful part" in his decision to confess. *Id.; Brown v. Illinois, supra,* 422 U.S. at 610 (Powell, J., concurring). Where the police are relatively non-intrusive, act in complete good faith, clearly protect the defendant's Fifth and Sixth Amendment rights, and the defendant himself testifies that he spoke willingly to the police and voluntarily confessed, this conclusion is inescapable. The deterrent policies of the exclusionary rule are therefore not invoked and its application to exclude Dunaway's confession would be futile.

To hold otherwise would offend our shared sense of proportionality, which is a necessary ingredient to our sense of justice. The inherent reliability and relevancy of Dunaway's confession is unquestioned. No one suggests that his statements to the police are not trustworthy. Thus, *a fortiori* application of the exclusionary rule would insulate from the jury "the most probative information bearing on the guilt or innocence of the defendant" and would lessen the reliability of the fact-finding process and probably set a person guilty of a heinous and brutal murder free. *Stone v. Powell, supra,* 428 U.S. at 490. See, *id.,* 428 U.S. at 540 (White, J., dissenting); *United States v. Ceccolini, supra,* 435 U.S. at 277-278.

[35]"[T]he notion of voluntariness has practical value in deciding whether the [exclusionary] rule should apply to statements removed from the immediate circumstances of the illegal arrest." *Brown v. Illinois, supra,* 422 U.S. at 610 (Powell, J., concurring).

Similarly, application of the exclusionary rule in this case would also offend our sense of justice.

> The disparity in particular cases between the error committed by the police officer and the windfall given by the rule to the criminal is an affront to popular ideas of justice. Indeed, this lack of proportionality demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence. Proportionality is a major element of our sense of justice. The lack of proportionality between the crime and the punishment was shocking when Jean Valjean received what amounted to a life sentence for stealing a loaf of bread, and a similar sense of injustice arises from the disparity between the police officer's error and the failure because of it to punish one who has committed a serious crime. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan.L.Rev. 1027, 1036 (1974).[36]

When the police intrusion is not only trivial, but also is in complete good faith, this argument becomes even more compelling.

In short, we believe that Dunaway's statements were sufficiently the product of his free will to be admissible irrespective of the legality of his original contact with the police, and also that the policies of the exclusionary rule would not be advanced by exclusion of the evidence in this case.[37]

[36]"The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." *Stone v. Powell, supra,* 428 U.S. at 490.

[37]The Court has recognized that the problem of proportionality has serious implications for another aspect of the "imperative of judicial integrity." Just as "the courts must not commit or encourage violations of the Constitution," (*United States v. Janis, supra,* 428 U.S. at 458, n. 35), so, too, they must ensure that their decisions are rational and otherwise comprehensible. Where a decision results in application of the exclusionary rule when none

Footnote continued on next page—

—*Footnote continued from preceding page*

of the policies underlying that rule are invoked by the circumstances of the case, that decision is not comprehensible in any ordered system of priorities.

> Although the [exclusionary] rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. *Stone v. Powell, supra,* 428 U.S. at 691.

In a similar vein, Professor Kaplan has observed,

> [I]n actual operation, the [exclusionary] rule would seem to injure judicial integrity far more than it serves that end . . . [A]ny moral end that is served in the name of judicial integrity must be balanced against our sense of injustice not only at letting a serious criminal go free, but at letting him go free because of what may be a trivial error by the police. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan.L.Rev. 1027, 1036 n.53 (1974).

Thus, the "imperative of judicial integrity" requires, in cases such as this one, that courts refrain from applying the exclusionary rule.

Conclusion

The rather serious consequence of excluding petitioner Dunaway's voluntary statements is unwarranted in this case. He agreed to accompany the officers with little prompting and with no threats or coercion.

The manner and extent of questioning were reasonable, designed to protect all of his rights, and in conformance with the requirements of existing New York law. The intrusion into Dunaway's life was minimal and necessary in light of the dilemma faced by the police.

"[J]ustice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934) (Cardozo, J.).

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner

-vs-

STATE OF NEW YORK,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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Petitioner,

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Respondent.

REPLY BRIEF FOR THE PETITIONER

SUMMARY OF ARGUMENT

Irving Jerome Dunaway was illegally arrested by members of the Rochester Police Department on August 11, 1972 and the taint of that illegal arrest was not dissipated by any of the intervening factors outlined in the Court in Brown v. Illinois, 422 U.S. 590 (1975). Further, since the police action was not required "for their safety" or due to any "exigent circumstances," their calculated seizure of the petitioner without probable cause was not reasonable under the Fourth Amendment.

POINT I: THE PETITIONER WAS ARRESTED WITHOUT PROBABLE CAUSE AND SINCE THE TAINT OF THAT ILLEGAL ARREST WAS NOT PROVEN BY THE PROSECUTION TO HAVE BEEN DISSIPATED, THE CONFESSION OBTAINED BY THE POLICE SHORTLY AFTER PETITIONER'S ARREST WAS ERRONEOUSLY ADMITTED INTO EVIDENCE AT HIS TRIAL SINCE IT WAS OBTAINED IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS.

A: The Petitioner's Arrest and/or "Seizure" Response to Respondent's Point I pp. 7-9

In Point I of their brief, respondent argues that petitioner was not seized because he agreed to accompany the officers. In making this argument, the respondent completely ignores Judge Mark's findings after the hearing wherein he ruled,

> ..., there can be no doubt that this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police Oregon v. Mathiason, ___U.S. ____, 1/25/77, or where the defendant was merely escorted to police headquarters by the police. People v. Brown, 86 Misc 2d 339. (A-117; emphasis added)

A reading of People v. Brown, supra clearly establishes that Judge Mark specifically overruled the proposition the respondent is now attempting to raise.

The Appellate Division's finding that the defendant went voluntarily with the police does not change or alter Judge Mark's ruling as it applied to the issue of petitioner's arrest. Had the Appellate Division intended such a result, this case could have been decided on existing law by holding

that the petitioner consented to the arrest and detention, thereby waiving his constitutional objections (People v. Morales, 52 AD2d 818 (1st Dept. 1976) affd. 42 NY2d 129, 137-138(1977); People v. Gonzalez, 39 NY2d 122, 127 (1976)). They refused to do so.

Further, and more significantly, the law does not require a defendant to "resist" a police confrontation in order to preserve and protect his constitutional rights. (United States v. Lampkin, 464 F2d 1093, 1095 (3rd Cir. 1972). This rule is sound because to hold that a defendant is required to resist and object to any police confrontation would seriously jeopardize the safety of police officers in performing their authorized duties (See, United States v. Edmons, 432 F2d 577 (2nd Cir. 1970), where the defendants resisted a police confrontation creating a very dangerous police-citizen situation).

Clearly the petitioner was cognizant of the fact that he was under the control of the police detectives (A 81) and the police intended that to be the nature of the restraint they placed on this youth's liberty (A 73; 76; 109-110).

This petitioner was arrested by the Rochester Police Department without probable cause. To permit an "arrest on mere suspicion collides violently with the

basic human right of liberty." (Henry v. United States, 361 U.S. 98, 101 (1959) [quoting from Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rational and Rescue, 47 Geo. L. J. 1, 22]).

C: Attenuation under Brown v. Illinois, 422 U.S. 590. Response to Respondent's Point III pp. 23-34

It appears that respondent's basic position is that since petitioner's confessions and sketches were voluntary (i.e. an obvious Fifth Amendment issue) there is no real need to examine the admissibility of his confessions in light of the Fourth Amendment. As respondent states, "..., we submit that the 'taint' created by the police conduct was de minimus, at most.... Therefore the Court should require very little additional proof of voluntariness beyond the Fifth and Sixth Amendment requirements." (Respondent's brief p. 26). Counsel for the petitioner respectfully submits that it was this precise argument this Court rejected in Brown v. Illinois, supra. In that case this Court specifically recognized the importance and independence of the protections provided by the Fourth Amendment. It is for that reason that the Court established certain criteria which should be used in determining whether the "taint" of an illegal seizure has been dissipated. The respondent does not contest the fact the petitioner clearly complies with three of the

four criteria. They merely contend that the police conduct in this case was not "flagrant" because the police did not use force or weapons when they arrested this petitioner. In support of their position they cite United States v. Kilgen 445 F2d 287 (5th Cir. 1971), a case referred to in footnote 9 of this Court's opinion in Brown v. Illinois, supra. Petitioner respectfully submits that cases referred to in that footnote pertain to the issue of "the purpose of the official misconduct." A brief analysis of the cases cited therein would, therefore, seem appropriate.

United States v. Edmons, 432 F2d 577 (2nd Cir. 1970) involved a case where the petitioners were arrested for failing to have selective service cards on their person. Yet it was clear from the record that the arrests were made to gather information about an earlier assault on an F.B.I. agent.

United States ex rel. Gockley v. Myers, 450 F2d 232 (3rd Cir. 1971) cert. denied 404 U.S. 1063 (1972) involved a case where an arrest warrant (without probable cause) was issued for forgery and upon his arrest it became apparent the police wanted to question the defendant about information he had regarding a recent murder.

In both cases the arrests were effectuated as a pretext for collateral objectives.

United States v. Kilgen, supra presented a situation where the police arrested petitioner for a violation of existing vagrancy laws. The arrest was for that purpose and the record in that case did not disclose any ulterior motive for the arrest. Later, the petitioner confessed to a Burglary and his confession was not suppressed. In Kilgen, it is clear that there was no ulterior motive or purpose for the petitioner's arrest. Since the purpose of the arrest in Kilgen was proper, his confession was found to be admissible. However, the purpose of the arrests in Edmons and Gockley was not proper and the evidence derived therefrom was suppressed.

In the case at bar, the purpose of the petitioner's arrest by the police was to interrogate petitioner incommunicado in the hope of turning up evidence. In other words, the purpose of the arrest was purely investigatory.

In order to determine whether the police conduct in this case was "flagrant," Mr. Justice Powell's concurring opinion in Brown v. Illinois, supra is most helpful. Therein three examples are given of conduct which should be considered flagrantly abusive:

> If, for example, the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause...,
>
> or if the evidence clearly suggested that the arrest was effectuated as a pretext for collateral objectives...,
>
> or the physical circumstances of the arrest unnecessarily intrusive on personal privacy... (Brown v. Illinois, supra, at 610-611 [Powell, J., concurring]).

The facts in Brown clearly complied with the third example set forth above; while the facts in petitioner's case clearly come within the first example of flagrant official misconduct. The Court's below have unanimously held that the police clearly acted without probable cause (A-121; 125-126) and as Justice Cardamone stated at the Appellate Division in his dissenting opinion, "the arrest or detention made here, concedely without probable cause, without a warrant and under circumstances which were investigatory in nature constitutes flagrant official misconduct." (A-132)

Since the facts in the case at bar clearly constitute flagrant official misconduct as set forth in Mr. Justice Powell's first example, it follows that "the clearest indication of attenuation" is need; otherwise, the deterrent value of the exclusionary rule is most likely to be effective, and..., most clearly demands that

the fruits of official misconduct be denied." (Brown v. Illinois, supra, at 611 [Powell, J., concurring]; Also see, Ryon v. Maryland, 422 U.S. 1054 (1975), on remand 349 A2d 393 (Md. 1975); People v. Bates, 546 P 2d 491 (Colo. 1976)).

POINT II: SHOULD THIS COURT CHOOSE TO DIFFERENTIATE BETWEEN "ARREST" AND/OR "SEIZURE" AND "DETENTION" AND SHOULD IT FIND THAT THIS PETITIONER WAS NOT "ARRESTED," THEN DID PETITIONER'S "SEIZURE FOR PURPOSES OF DENTENTION AND/OR INTERROGATION" VIOLATE THE FOURTH AMENDMENT.

D: Application of "Reasonableness Standard" Response to Respondent's Point II pp. 10-22

In their brief respondent argues that the police action of seizing petitioner without probable cause was reasonable under the Fourth Amendment

Since this Court has never held that custodial detention and interrogation on less than probable cause is permissible under the Fourth Amendment (Terry v. Ohio, 392 U.S. 1, 19 footnote 16 (1968); Morales v. New York, 396 U.S. 102, 104-105 (1969)), the respondent is clearly suggesting an additional exception to the Fourth Amendment's requirement of probable cause. As the brief filed by amici indicates, this Court has carefully deliniated

specific exceptions to the requirement of probable cause. Those exceptions have been carefully established and limited to situations where the police have legitimate concerns about their safety when making necessary on the street confrontations. (See, Terry v. Ohio, supra; United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Pennsylvania v. Mimms, 434 U.S. 106 (1977)).

In order to sustain their position, respondent apparently offers four reasons for creating a new exception to the probable cause requirement: (1) the petitioner had no reasonable expectation of privacy; (2) the intense public interest in solving a murder case; (3) the police had exhausted and lacked viable investiative alternatives, and, (4) the "Morales Rule" permitting brief detention for questioning one suspected of a serious crime without probable cause does not give the police broad and unlimited discretion and since the New York Court did not abdicate their responsibility, their judgment is entitled to deference.

What is most interesting about the respondent's argument is that it closely parallels that of the respondent in Mincey v. Arizona, 437 U.S. 385 (1978). In Mincey the respondent was seeking a "murder scene" exception to the warrant requirement of the Fourth

Amendment to enable them to search that petitioner's apartment.[1] In the case at bar respondent's are seeking to create an exception to the Fourth Amendment which would permit the police to "seize" and interrogate a citizen without probable cause. Both cases also involved petitioners convicted of murder.

In Mincey, as in the case at bar, the respondents contend that the petitioners have no reasonable expectation of privacy (Mincey v. Arizona, supra, at 391; respondent's brief pp. 10-12; 16-17). This Court specifically rejected that argument citing Michigan v. Tyler, 436 U.S. 499 (1978) and stating, "it suffices here to say that this reasoning would impermissibly convict the suspect even before the evidence against him was gathered."

The next reason suggested in both cases is the intense "public interest" in either promptly investigating or solving serious murder cases (Mincey v. Arizona, supra, at 393-394; respondent's brief pp 12-13; 15). This Court specifically rejected that argument as well stating, "No one can doubt the importance of this goal. But the public

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[1] As in Mincey, the police in the case at bar also failed to request a warrant.

interest in the investigation of other serious crimes is reprehensible.... 'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine Chimel v. California, supra, at 766." (Mincey v. Arizona, supra, at 393)

The third similar reason advanced by both respondents is that each State Court narrowly confined its holding to certain established guidelines and thereby was entitled to deference (Mincey v. Arizona, supra, at 394; respondent's brief pp. 21-22). That argument was also rejected by this Court. The rule developed in dictum by the New York State Court of Appeals is based on the nature of the crime and a careful guarding of a citizen's Fifth and Sixth Amendment rights. Such a rule is "without rational limitation" and totally disgards the clear intended purpose of the Fourth Amendment which this Honorable Court sought to protect in Brown v. Illinois, supra. - the right of citizens to be free from bodily seizures by the police who are acting without probable cause. Without attempting to be facetious, it appears to this writer that the New York Court of Appeals is attempting to develop a rule that permits the police to ignore the Fourth Amendment as long as the crime is "serious" and the officers comply with the Fifth and Sixth Amendments in

"securing" a confession. This rule totally ignores the criteria and guidelines developed by this Court in Brown v. Illinois, supra. Other state courts have applied and not avoided those criteria (Dixon v. State, 369 A2d 593 (Md. 1975), which was remanded to the Maryland Court on the same day as this petitioner's case; People v. Bates, 546 P2d 491 (Colo. 1976); Commonwealth v. Farley, 364 A2d 299 (Pa. 1976)).

A fourth reason given by the respondent for the broadening of the Fourth Amendment is that the police exhausted and lacked viable investiative techniques (Respondent's brief pp. 18-19). Petitioner respectfully, yet strongly, submits that the respondent never offered any relevant testimony at the hearing before Judge Mark which established this factor or reason. Counsel for the petitioner fails to see the basis for respondent's argument in the record. None of the police officers established what they had done, what they were doing or what they were intending to do! All the record shows is that more than four months had elapsed since the time of the murder.

At the hearing before Judge Mark, the respondent inquired as to the nature of the confrontation and the nature of the information possessed by the police. All that we know from the record is that the source of the

police information and does fail to corroborate that information from Hubert Adams (A-52). We know that the police never even attempted to contact Adams to determine the truthfulness of that information. The respondent, who had the burden of establishing factors relevant to the reasonableness of the police conduct, never raised this issue at the hearing and petitioner respectfully submits that there is no evidence on the record before this Court which justified such a finding. Even if the respondent established the lack of investigative alternative, as the brief filed by amici indicated, "this Court has never suggested that safeguards of the Fourth Amendment can be dispensed with because of the unavailability of other investigative techniques. In fact, the Court has repeatedly indicated the opposite. (citations omitted)" (Brief of Amici p. 13)

It is extremely significant to note that none of the reasons suggested by Respondent deal with the necessities or exigencies of the facts surrounding the police seizure of this petitioner. The reason - there were none. As this Court previously stated, "a central element in the analysis of reasonableness" are "the exigencies of the case." (Terry v. Ohio, supra, at 17-18 footnote 15)

None of the reasons set forth by the respondent show that there was a compelling need for the officers to act as they did in seizing petitioner without probable cause. Clearly, the police conduct was not reasonable when viewed in light of the standards developed by this Court in Terry v. Ohio, supra.

CONCLUSION

Petitioner respectfully requests that the judgment below be reversed and the "fruits" of petitioner's illegal detention be suppressed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

INTEREST OF AMICI [1]

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 200,000 members, dedicated solely to defending

[1] Letters of consent to the filing of this brief from the parties have been lodged with the Clerk of the Court.

the principles of freedom and democracy embodied in the Bill of Rights. The New York Civil Liberties Union is the New York state affiliate of the ACLU, having a membership of 20,000. It is similarly dedicated to defending our fundamental constitutional freedoms.

Central to those freedoms is the right to be free from unreasonable government searches and seizures protected by the Fourth Amendment of the United States Constitution. That Amendment erects a critical barrier between the government and the citizen, and it defines the standards which the government must follow whenever it seeks to invade "the right of the people to be secure in their persons."

The ACLU and NYCLU have repeatedly urged upon this Court a "strict construction" of that Amendment. New York has now substantially abridged the right to be free from unreasonable seizures by authorizing lengthy custodial detentions based on less than probable cause. It is the purpose of this brief to show that the practice authorized by New York is unconstitutional.

STATEMENT OF THE CASE

Four-and-a-half months after the murder and attempted robbery of a pizza parlor proprietor in Rochester, New York, detective Fantigrossi, of the Rochester police department, heard from a fellow officer that an informer had heard a rumor which named one of the people responsible. Fantigrossi interviewed the informer, whom he had not previously known. The informer told Fantigrossi that James Cole, at that time an inmate in the Monroe County Jail, had said that he and "Irving" - that is, petitioner Dunaway - committed the crime.

Fantigrossi then questioned Cole in the Monroe County Jail. Cole maintained his innocence. However, after two hours, he in turn said that Hubert Adams, a former inmate in the jail who was then incarcerated at Elmira Correctional Facility in New York, had told him two months earlier that his brother, "BaBa" Adams, and "Irving" had committed the crime.

Rather than questioning Hubert Adams, who was about 100 miles away in Elmira, rather than looking for "BaBa" Adams in Rochester, and rather than going to visit Dunaway himself in order to question him at his home, detective Fantigrossi sent detectives to Dunaway's home with explicit

instructions to pick him up and bring him to the police station for interrogation. Fantigrossi subsequently testified that he knew at the time he sent out the detectives that he did not have enough information to obtain a warrant. (A-24).

Detectives went to petitioner's house several times that day to no avail. At eight o'clock the next morning, detectives found petitioner's mother at home. Two of them entered without a warrant and searched the house for Dunaway. The third detective observed an unidentified woman leave by a side door and enter a house nearby. Two armed detectives, each over 6 feet 3 inches tall and weighing more than 200 pounds, went to the other house. Dunaway came to the door. He was 18 years old, had completed the tenth grade, stood 5 feet 7 inches tall, and weighed only 130 pounds. Although the detectives could not recall whether they touched him, Dunaway testified that they "grabbed" him and told him that they were taking him to the police station. (A-13). He repeatedly asked why, but the detectives did not answer him.

Respondent has stipulated that petitioner was in the custody of the detectives and that they would have physically restrained him if he had attempted to walk away.

At the police station, Dunaway was given Miranda warnings and questioned without delay. He immediately made inculpatory statements and drew sketches which were the basis of his convictions for felony murder (petitioner did not kill the victim) and attempted robbery.

At the suppression hearing before trial, the statements and sketches were ruled admissible. The conviction was affirmed without opinion by both the Appellate Division (A-33) and Court of Appeals (A-30). This Court granted certiorari, vacated, and remanded "for further consideration in light of Brown v. Illinois, 422 U.S. 590 (1975)." Dunaway v. New York, 422 U.S. 1053 (1975) (A-29).

In turn, the Court of Appeals remanded to the trial court because it found the record inadequate to determine whether petitioner was detained, whether there was probable cause for the detention, and "in the event there was a detention and probable cause is not found for such detention,... whether the making of the confession was rendered infirm by the illegal arrest. (See Brown v. Illinois, 422 U.S. 590, supra)." 38 N.Y.2d 812, 813-14 (1975) (Emphasis added), (A-26).

After the Court of Appeals had said that detaining Dunaway without probable cause would be an "illegal arrest," the

trial court, on remand, found that there was no probable cause for petitioner's detention, which it also viewed as an arrest. (A-24). Nevertheless, the Appellate Division, in a three-way split decision, reversed the trial court's suppression of the inculpatory statements and sketches. People v. Dunaway, 61 A.D.2d 299 (4th Dept. 1978). (A-5). Relying on a Court of Appeals case decided after the Court of Appeals remanded petitioner's case, People v. Morales, 42 N.Y.2d 129 (1977), on remand from this Court, 396 U.S. 102 (1969), the Appellate Division's majority reasoned that a "detention for interrogation based upon reasonable suspicion...where great public interest existed in solving a brutal crime which had remained unsolved for a period of almost five months," was a proper investigatory procedure. People v. Dunaway, 61 A.D.2d at 303. (emphasis added). The majority cited as an alternative ground for upholding Dunaway's conviction that:

> ...the statements and drawings made by defendant were of sufficient free will to purge the primary taint of any unlawful detention that may be said to have taken place....
> Id. at 304 (A-10).

The concurring Appellate Division justice agreed that Dunaway's detention

for interrogation was proper but stated that, if the detention had been improper, the inculpatory statements and sketches would indeed have been tainted. The dissent distinguished petitioner's situation from that in People v. Morales, 42 N.Y.2d 129 (1977), and found that petitioner's case was controlled by Brown v. Illinois, supra:

> [I]t may not be said that Dunaway was briefly detained under carefully controlled circumstances. Rather, he was illegally seized, detained or arrested and his rights should not turn upon the use or failure to use the word "arrest" where that, in fact, was his status.
> People v. Dunaway, 61 A.D.2d at 307 (Cardamone, J., dissenting).

The Court of Appeals affirmed without opinion (A-2), and this Court granted certiorari on November 28, 1978.

SUMMARY OF ARGUMENT

Detective Fantigrossi admitted that when he sent his burly detectives to Dunaway's home to pick him up for questioning he lacked the probable cause necessary for a warrant. He merely suspected Dunaway, as he had earlier - and erroneously - suspected Cole. Rather than drive south 100 miles to Elmira, or cast about Rochester for "BaBa" Adams, or go out himself and interview Dunaway at his house, Fantigrossi chose to have two large, armed detectives "grab" the slight, unarmed Dunaway without explanation and bring him to the police station. Dunaway had no choice but to go. He was young and unsophisticated, but he knew better than to resist arrest.

The rights of such uncharged individuals, in their own or their neighbors' homes, are precisely the rights that the Fourth Amendment was designed to protect. Warrants, when possible, and police determinations of probable cause, when they are not, are the innocent citizen's only protections against lengthy in-custody station-house detentions. But in New York no such controls presently exist. If the police in New York suspect someone of a "brutal and heinous" crime, they may simply "grab" him.

In developing this novel doctrine, the New York courts attempted to distinguish this Court's clear holding in Brown v. Illinois. I.A. However, the distinctions the New York courts drew were either irrelevant or erroneous, or both. I.A. The seizure of Dunaway was, in fact, an "arrest" for all relevant constitutional purposes, no matter what New York chooses to call it. Thus, it may not be effected on less than probable cause. I.A.

Moreover, examination of the three instances in which this Court has permitted the seizure of a person on less than probable cause confirms the fact that police station detentions may be effected only upon probable cause. I.B. Streetcorner stops, border inspections, and self-protective procedures followed after stops for minor traffic violations in no way resemble the extensive intrusions which New York has condoned. I.B. And the complex, multi-graded sliding scale analysis of Fourth Amendment issues adopted by New York, in addition to taking into account factors which are constitutionally irrelevant, also embroils the courts in a major new jurisprudential undertaking. I.C. Adopting the New York doctrine would require re-writing the body of Fourth Amendment law

in a way which would significantly impair the administration of justice as well as individual liberty. I.C.

Finally, the lower court's alternative holding, that the taint of Dunaway's illegal arrest had dissipated by the time he made his inculpatory statements and sketches, is clearly erroneous. II.

ARGUMENT

I. THE DETENTION OF PETITIONER WAS AN UNCONSTITUTIONAL SEIZURE BECAUSE IT WAS NOT BASED ON PROBABLE CAUSE.

The first question raised by the Court's remand of this case in light of Brown v. Illinois, 422 U.S. 590 (1975), is whether the custodial detention of petitioner for interrogation was legal. The question of "the legality of such custodial questioning on less then probable cause for a full-fledged arrest" was expressly reserved in Morales v. New York, 396 U.S. 102, 105-06 (1969). See also Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968); Davis v. Mississippi, 394 U.S. 721, 728 (1969).

This Court has made clear that

the legality of any forcible detention depends on the particular facts of each case, and not on the labels state courts apply to those facts. Here, armed policemen, concededly acting without probable cause, went to a private dwelling at eight o'clock in the morning, took a person into custody, and delivered him to the police station for extensive investigative questioning, which was preceded by full Miranda warnings. The detention of a person under these circumstances is an illegal seizure within the meaning of the Fourth Amendment regardless of the label New York gives it.

A. The Custodial Investigative Detention of Petitioner Is So Similar To That Effected Upon The Defendant In Brown v. Illinois That The Admitted Lack Of Probable Cause Renders It Unconstitutional.

In Brown v. Illinois, supra, the Court condemned detentions for custodial questioning effected without probable cause to arrest:

> "The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by

> the two detectives when they repeatedly acknowledged in their testimony that the purpose of their action was 'for investigation' or for 'questioning.' The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up." 422 U.S. at 605. (record references and footnotes omitted).

As the Court noted in remanding petitioner's case, Brown is directly relevant here.

In both Brown and Dunaway, armed police entered the defendant's home without a warrant, shortly thereafter took him into custody, and then transported him to the police station in a police car. In both cases, the officers admitted that their suspects were not free to leave, and in both cases, the officers acted without probable cause. Both defendants were given Miranda warnings upon their arrival at the police station. Both were then questioned until they gave incriminating statements. From a constitutional viewpoint, the cases are indistinguishable.

Yet, despite these facts and this Court's explicit remand order, the New York courts have strained to distinguish

Brown rather than to follow it. The factors New York relies upon to distinguish Brown and to create a new exception to the Fourth Amendment's probable cause requirement are that: (1) "all investigative techniques, save interrogation, were exhausted;" (2) there was "reasonable suspicion;" (3) the crime was "brutal and heinous;" and (4) the seizure was "brief" and resulted in no formal "arrest" record. People v. Dunaway, 61 A.D.2d at 302-03 relying on People v. Morales, 42 N.Y. 2d 129, 136 (1977). None of these distinctions is valid.

First, neither Brown nor other cases in this Court have ever suggested that the safeguards of the Fourth Amendment can be dispensed with because of the unavailability of other investigative techniques. In fact, the Court has repeatedly indicated the opposite. Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); Mincey v. Arizona, ___ U.S. ___, 57 L.Ed.2d 290, 300 (1978); Michigan v. Tyler, ___ U.S. ___, 56 L.Ed.2d 486 (1978). In any event, it is clear from the record in this case that a number of other "investigative techniques" short of forcible custodial

Q. Did you arrest Dunaway at that point, say you are under arrest?
A. No, sir, I did not.
Q. Did you have any conversation whatever with Dunaway?
A. Not at that point, no.
Q. Now, at that point—from that point on the three of you walked to the police car, is that correct?
A. Yes, sir.
Q. Was there any conversation while you were walking to the police car?
A. No, not that I can remember, not at that time.
Q. How far was the police car from 102 Walnut?
A. The police car was still parked approximately in front of the Broad Street address of Mr. Dunaway.
Q. And, well, that doesn't answer my question. How far was it?
A. Half a block.
Q. Well, 100 yards, 57 yards, half a block. There is some approximation?
A. Not very far. I wouldn't know in feet or inches.
Q. You will have to walk down three houses from 102 in the intersection, is that correct?
A. Yes, sir.
[52] Q. And then you would have to travel down Broad Street and up Broad Street?
A. We angled from the intersection and walked across.
Q. So, when was the first time you had a conversation, if any time, with Mr. Dunaway?
A. In the police car.
Q. Where were you in the police car, were you driving now?
A. No, sir, I was not.
Q. Where were you positioned in the police car?
A. I think I was seated in the front seat.
Q. Where was Dunaway?
A. He was in the back seat.
Q. Who else was with him?
A. Detective Mickelson.
Q. What was your conversation, if any, you had with Mr. Dunaway?

A. He said well, I think if I remember, he said why do we have to go downtown and talk. We said we would discuss that in full when we got downtown.
Q. Your testimony is he asked why he had to go downtown and talk?
A. Yes, sir.
Q. You said you would tell him?
[53] A. Yes, when we got downtown we would tell him.
Q. It was made clear to him and he had to downtown and that was where the conversation would be?
A. He was told, that was the answer that he was given for the question he asked.
Q. He asked why did he have to go downtown?
A. Why do we have to talk downtown and we told him that we would discuss it when we got downtown.
Q. Was there any discussion before that that he had to go downtown and talk?
A. No, sir.
Q. Out of the blue sky he said why do I have to go downtown?
A. Maybe he was thinking about it when we were walking to the car. I don't know if it was out of the blue sky or not.
Q. You don't remember anybody telling him he had to go downtown and talk?
A. No, sir.
Q. It was you who answered the question as to why or Mickelson?
A. I think it was a combination of the two of us telling him.
Q. Now, neither you or Mickelson or anyone else ever told him that he didn't have to come downtown, is that correct?
A. I never told him, no.
Q. Did you at any time, when he was put into the police car, [54] advise him that he was a suspect?
A. No, sir, I did not.
Q. Did you hear anybody advise him he was a suspect?
A. No, sir.

Q. Did anybody advise him of the so-called Miranda rights?
A. No, sir.
MR. SPIRES: You mean in the police car?
MR. CRIMI: In the police car or at the door at 102 Walnut Street. At any time up to the time he went to headquarters.
THE WITNESS: No.
Q. Is that police car the type of police car that has the wire partition between the front and back seat?
A. No, sir.
Q. What kind of a police car, marked or unmarked?
A. Unmarked.
Q. Was there any other conversation on the way to police headquarters?
A. No, sir.
Q. Approximately what time did you arrive at police headquarters?
A. Approximately 8:30 in the morning.
Q. What did you do with the gun when you arrived?
A. It was turned over to Detective Novensky.
[55] Q. Where?
A. In the Detective Bureau, the fourth floor of the Public Safety Building.
Q. Where did he go while he was there?
A. You mean where did Novensky take him?
Q. Yes.
A. I have no idea.
Q. What was the purpose for turning him over to Novensky?
A. They were going to continue the investigation.
Q. They were going to ask him questions?
A. I would assume so.
Q. You didn't know anything about that, did you? You were bringing him up there to be interrogated?
A. He was picked up, yes. I assumed they were going to talk to him. That is why they took him.
Q. You and Mickelson picked him up for the purpose of bringing him downtown to be interrogated, is that a fair statement?
A. To be talked to, yes, sir.

Q. To be talked to?
A. Yes, sir.
Q. Did you or anyone notify police headquarters that you had apprehended Dunaway and on your way down?
A. I don't think so.
[56] Q. So, that when you got to police headquarters Novensky wasn't waiting for you?
A. I don't think so, no. I think his tour was starting then. I can't be positive.
Q. How about Fantigrossi, was he there when you got there? Did you have any conversation with Fantigrossi and tell him you had picked up Dunaway?
A. No, sir, not that I remember that I had a conversation, no.
Q. There is absolutely nothing else that occurred at police headquarters that you had knowledge other than the fact you turned him over to Novensky, is that your testimony?
A. Yes, sir, that is as far as I went.
MR. CRIMI: I would like to have a moment, your Honor.
Q. Did you at any time put Dunaway under arrest?
A. No, sir.
MR. SPIRES: That has already been asked and answered. I object.
THE COURT: Overruled.
Q. Had I asked you that?
A. Yes, sir.
Q. Now, where was Ruvio at this time?
A. We left Ruvio at Broad Street and I didn't see him again until we got back to the car.
[57] Q. Was there a reason for leaving him?
A. At the time he was on the phone to Captain Cavoti.
Q. Somebody instructed him to call Cavoti?
A. We received a radio transmission he was to call Cavoti.
Q. Concerning what?
A. I don't know.
Q. Concerning this case?
A. All I know is he was instructed to call Captain Cavoti.

Q. When did that radio message come in?
A. Just as we arrived at Broad Street, the police station came in.
Q. Were you in contact with headquarters at all concerning the picking up of Dunaway to the time you were at Broad Street to 102 Walnut?
A. No, sir.
Q. Was anyone in your group?
A. I don't know.
Q. Did you have radios?
A. Yes.
Q. As far as you know no one communicated with anyone at headquarters? You apprehended Dunaway?
A. As far as I know, no.
MR. CRIMI: I don't have any further questions.

[58] REDIRECT-EXAMINATION BY MR. SPIRES:

Q. On that morning were you a member of a team with either Detective Ruvio or Mickelson in connection with the Dunaway investigation?
A. No, sir.
Q. Do you know if those two were a team by themselves?
A. Yes, sir.
Q. One with the other?
A. Yes.
Q. Each with the other?
A. Yes.
Q. Now, you testified that in the police car on the way downtown Dunaway inquired as to why he had to go downtown to talk?
A. Yes, sir.
Q. And do you remember the exact language, the exact words expressed?
A. No, sir, I don't.
Q. May he have said why do you want to talk to me downtown?
MR. CRIMI: I object to that.
THE COURT: Sustained.

MR. SPIRES: This question might refresh the man's recollection. I don't know the grounds of the [59] objection.
MR. CRIMI: The ground of the objection is you are suggesting by the inference of your advising something possibly could have been said this way or the other way.
MR. SPIRES: Might it not jog his recollection?
MR. CRIMI: That could jog anybody's recollection.
MR. SPIRES: This is a basis in the record. All right. You don't remember?
THE WITNESS: Pardon?
Q. You don't remember whether he might have said that?
A. No.
Q. Do you remember in the questions he asked you gentlemen on the way downtown, do you remember for sure whether or not he said anything which would indicate he had a compulsion to go downtown?
MR. CRIMI: I object.
THE COURT: Overruled.
THE WITNESS: The only thing was he did not object when we told him he would have to wait until he got downtown.
MR. SPIRES: That is not what I am asking.
MR. CRIMI: Let the answer stand.
[60] MR. SPIRES: May I repeat the question?
THE COURT: Yes.
Q. Whatever language Dunaway used in questioning why he had to go downtown to talk, as we said before, can you remember whether or not he used any words which indicated a compulsion that he had to go downtown?
MR. CRIMI: I object to the form.
THE COURT: Overruled.
THE WITNESS: No, sir.
MR. CRIMI: Indicating compulsion is a valid question on direct and this is redirect. I accept.
Q. Do you remember whether or not he said why do I have to go downtown to talk?
MR. CRIMI: I object, the inflection of the voice "do I have to go downtown".

Q. The question asked originally was answered in a conclusory fashion, not a quotation form.

MR. CRIMI: It is your witness, I don't draw the conclusions from him. Exception.

MR. SPIRES: I am sorry, it was your witness when this question was asked.

Q. Do you remember whether he used that language, why do I have to go downtown to talk?

[61] A. I think he said why do we have to go downtown to talk.

Q. You think he did use that language?

A. Yes.

Q. That question was answered in what fashion, how was it answered?

A. When we get downtown, we will explain to you in full.

Q. On the way, I believe it was at the Walnut Street house where you and Detective Mickelson encountered Dunaway, is that correct?

A. Yes, sir.

Q. On the way from—well, at Walnut Street address when you first observed the front door, the front door was open, is that correct?

MR. CRIMI: I object to that. That is—

MR. SPIRES: That is leading.

THE COURT: That is leading. Sustained.

Q. When you saw Mr. Dunaway for the first time, was the front door of Walnut Street opened?

A. Yes, sir.

Q. From that point when you first saw him to the time you walked with him and Mickelson out to the sidewalk, did you see any other person with Mr. Dunaway?

A. No, sir.

[62] Q. Did you see any other person in the doorway at Walnut Street?

A. No, sir.

Q. Did you see any other person follow you people out to the sidewalk?

A. No, sir.

Q. Did you see any other persons follow you to the Broad Street address?

A. Not that I noticed, no, sir.

Q. Now, did you observe yesterday afternoon in the corridor right outside of this courtroom—

MR. CRIMI: How is this redirect? I would like to know, your Honor, once and for all and let's run these trials correctly. How is this redirect? Where did I say anything about other people present and following him on cross-examination?

MR. SPIRES: Never mind the following—the specific question was asked about this witness about any other people.

MR. CRIMI: The only thing he observed was Mickelson taking Dunaway.

THE COURT: Overruled.

MR. CRIMI: Exception.

[63] THE COURT: As far as the people at Walnut Street address, but sustained as to the people in the hallway.

MR. SPIRES: All right. I have no further questions.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. Are you telling us now you observed that the door was open?

A. When I first saw Dunaway he was coming through an open door, yes, sir.

Q. Prior to that your only observation, as I understand, was that you, if it is to be called an observation, that you heard Mickelson say Dunaway or possibly heard him say Axlerod, Dunaway, is that correct? The only observation you made?

A. Yes, sir.

MR. CRIMI: That is all.

REDIRECT-EXAMINATION BY MR. SPIRES:

Q. Try and repeat for us the way you heard Detective Mickelson say those words, what you heard?

A. Axlerod and Dunaway.

MR. CRIMI: Well, did you hear those words Axlerod, Dunaway because you could only pick up part of the conversation or those were just the only words he said?
[64] THE WITNESS: Those were the words he said, Axlerod, Dunaway.
MR. CRIMI: One after the other?
THE WITNESS: Yes.
MR. SPIRES: Did you hear those words in a declarative or interrogatory manner?
MR. CRIMI: I object.
THE COURT: Overruled.
THE WITNESS: Like he was talking to Axlerod, Dunaway.
MR. SPIRES: Like he was saying the names rather than asking?
THE WITNESS: Yes, sir.
MR. SPIRES: Thank you.
MR. CRIMI: That is all.

(Whereupon the witness was excused.)

ROBERT C. MICKELSON, called herein as a witness, first being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SPIRES:

Q. You are a detective in the Rochester Police Department?
A. Yes, sir, I am.
Q. Do you recall testifying before the Monroe County Court, Judge Ogden presiding in 1971 to '72, in a pretrial hearing in this matter?
[65] A. Yes, sir, I do.
Q. Were you furnished with a copy of your prior testimony?
A. Yes, sir.
Q. Have you reviewed it?
A. Yes, sir, I have.
Q. If you were asked all of those same questions again, would you answer any of them differently?
A. No, sir, not intentionally, no, sir.

Q. Going back to the morning of August 11, 1971, tell us, please, the exact circumstances under which you encountered, actually met Dunaway?
A. There was a house and it was on a street off of Broad Street. I testified at that time, I can't recall the name of the street. I went up to the house, a green house, and went up to the house and knocked on the door. Dunaway came to the door and I said Mr. Dunaway, and he said yes. I said we would like to talk to you downtown, would you like to talk to us? He said yes. He came out of the house, walked between myself and another detective and got in the police car. We drove him downtown. At that time he was taken by two other detectives and I was sent home.
Q. This house on this other street, might that have been Walnut [66] Street?
A. Yes, sir.
Q. Was it Walnut?
A. Yes, sir.
Q. You don't remember the name?
A. No, sir.
Q. Did this house on Walnut have a porch in the front?
A. I can't recall if it had a porch, sir.
Q. Did it have steps?
A. Yes, sir.
Q. Had you knocked on the door?
A. I knocked on the door.
Q. The front door?
A. Yes, sir.
Q. Was it Dunaway who opened the door?
A. Yes, sir, it was.
Q. At that time were you standing on the top step outside the door?
A. I was standing just outside the door. I can't recall if Iwas on the step. I was outside the door.
Q. When Dunaway opened the door, was he holding that door open while you were conversing with him?
A. I can't recall.

[67] Would you remember if he closed the door behind him and stepped out to talk to you?

A. He stepped out. I can't recall if he closed the door.

Q. From the time you first saluted him, spoke to him, to the time you placed him in the police car, did you touch him in any way?

A. No, sir, I didn't.

Q. Touch any part of his clothes?

A. No, sir.

Q. Was the other detective with you Luciano?

A. Yes, sir.

Q. Did Luciano touch him, do you recall?

A. I can't recall, sir. I don't know.

Q. Can you recall, to the best of your ability, the exact words you used in talking to Dunaway at the doorway?

A. To my recollection he came to the doorway. I said either Mr. Dunaway, Axlerod, and he said yes. I said please, would you like to come downtown and talk to us?

Q. Would you like to come down and talk to us?

A. Something like that.

Q. Do you recall everything he said in response?

A. All he said was yes and walked out of the door and came with us.

[68] Q. He agreed to go downtown with you?

A. Yes.

MR. CRIMI: I object to agreed.

THE COURT: Sustained.

Q. If Mr. Dunaway had not said yes, and accompanied you, but instead had refused, if he had refused to accompany you, would you have forced him to accompany you?

A. At that time I would have placed him under arrest, yes, sir.

Q. Did you place him under arrest?

A. No, sir, I didn't.

Q. Did you take him into custody?

A. I asked him to go downtown and he agreed. I took him down.

Q. Did you believe you were taking him into custody?

A. I knew I was taking him downtown.

CROSS-EXAMINATION BY MR. CRIMI:

Q. I understand you had an opportunity to review your testimony that you gave at a previous suppression hearing and the trial, is that correct?

A. Yes, sir.

Q. You did review it, is that correct?

A. Yes, sir, I did.

Q. Now, Detective Mickelson, you had been at the Broad Street address prior to 8:00 o'clock that day?

[69] A. Yes, sir, I was.

Q. As a matter of fact, how many times had you been there before?

A. I can't recall. It was several times.

Q. Starting about what time?

A. It was at night. I can't recall. It was late at night, that night. It wasn't after midnight, it was late.

Q. It was not after midnight?

A. No, sir, it was late at night.

Q. You say you were there several times, would that be two or three times?

A. Yes, sir.

Q. And your purpose on each of those times was to pick up Dunaway?

A. Yes, sir.

Q. You were prepared to arrest him, is that correct?

A. Yes, sir.

Q. You, prior to going down the first time you went down to Broad Street, I understand that you had a conversation with Fantigrossi?

A. Yes, sir.

Q. What time was that?

A. I can't recall.

[70] Q. Had Mr. Spires asked you to refresh your recollection by looking through the record of this case?

A. Yes, sir, but I can't recall any questions of that nature.

Q. Well, didn't you make a police report on this case?

A. Yes, sir, I certainly did.

Q. Have you seen that?

A. No, sir.

Q. You haven't.
A. No, sir.
Q. After this investigation was over, whatever you testified to at the previous hearing and at that time this hearing is a matter in that police report, is that correct?
A. Yes.
Q. In view of the fact we are going to continue this, I would like that to be produced, your Honor, and Mickelson called back.
THE COURT: That will be produced for you and if you want to, you can recall Detective Michelson. That right is reserved for you.
Q. As I understand it from Lieutenant Fantigrossi's testimony, that he definitely told you to find Dunaway and bring him in?
A. Yes, sir.
Q. So, at that point you knew that you were going out to seize [71] Dunaway, is that correct?
A. Yes, sir.
Q. You did not apply for an arrest warrant, did you?
A. No, sir, I didn't.
Q. You went to Dunaway's home several times following that conversation?
A. Yes, sir.
Q. Who did you go with?
A. Detective Ruvio.
Q. Anybody else?
A. No, sir.
Q. Detective Fantigrossi stayed there. There was another team involved?
A. Yes.
Q. What was that team doing?
A. I don't know.
Q. Do you recall testifying that you spent prior to going to Walnut Street at 8:00 o'clock in the morning, that you had spent time searching the west side of Rochester for Dunaway?
A. Yes, sir.
Q. And you did that?
A. Yes, sir, we did.

Q. How long a period of time did you do that?
[72] A. It was all night.
Q. While you were searching was anyone applying for any kind of an arrest warrant?
A. Not that I know of.
Q. Did you ever have any arrest warrant?
A. No.
Q. Did you have a search warrant?
A. No, sir.
Q. Can you tell us what you did the first time that you went to the Broad Street address?
A. Yes, sir.
Q. What did you do?
A. Walked up to the door and knocked on the door and a woman came to the door. I asked if this was the home of Mr. Dunaway and yes, it was. It was her son and is he home and said no. I can't recall now whether she allowed us in—yes, we went inside.
Q. This is the first time?
A. Yes, sir, we went inside and we talked with Mr. Dunaway's mother. She said he was not home and we left.
Q. Did you tell her what you were looking for?
A. I said it was an investigation and we would like to talk to him.
[73] Q. Then you went there a second time?
A. Yes, sir.
Q. About when was that?
A. Sir, I really can't recall the time.
Q. You went there a third time?
A. Yes, sir.
Q. What time was that?
A. Sir, I really can't recall the time. It was late, it was through the night that we were looking.
Q. I am trying to fix how many times had you been there before this 8:00 o'clock knock on the door?
A. I can't recall whether it was two or three times. It was two or three or possibly four times that we were there.

Q. Now, at any time when you were there, on any of the times that you were there on Broad Street, did you look through the rooms of the house?

A. Yes, sir.

Q. And Detective Ruvio looked through the rooms of the house?

A. Yes, sir.

Q. You were searching for Dunaway?

A. Yes, sir.

Q. You had no search warrant?

A. No, sir.

[74] Q. Nor did you have an arrest warrant?

A. No, sir.

Q. Were you in communication with anyone at police headquarters through the search that night as to what you were doing and what success you were having?

A. Not that I recall.

Q. You can't recall?

A. Yes.

Q. You have a police radio?

A. Yes.

Q. All these times you were searching the west side of Rochester and the two or three times you had been to Broad Street, you never communicated whether you were having success or failure?

A. No, sir—well, Detective Ruvio at the time we went there in the morning, Detective Luciano, Detective Ruvio called Captain Fantigrossi by phone from Dunaway's.

Q. That is before you found Dunaway?

A. Yes.

Q. Did he tell you the message from Fantigrossi?

A. No, sir, I didn't talk to the Captain.

Q. Did you talk to Ruvio?

A. Yes, sir.

[75] Q. What did Ruvio say, the Captain say?

A. I didn't converse about the conversation on the phone. I was talking with Dunaway's mother.

Q. Where was the call made from?

A. Dunaway's home.

Q. So, you are saying Ruvio called from Dunaway's home and called Fantigrossi?

A. Not Fantigrossi, Captain Cavoti.

Q. At 8:00 o'clock in the morning you went to the address on Broad Street. Does 835 register as a possible number of that address on Broad Street?

A. Possibly.

Q. And Broad Street runs which direction in Rochester?

A. Broad Street runs north and south.

Q. And Walnut, therefore, would run east and west, is that correct?

A. Yes.

Q. Walnut intersects Broad?

A. With Broad Street, yes.

Q. How far was that house on Broad Street from 102 Walnut?

A. Maybe two blocks.

Q. After you—strike that out. I believe you testified after you had been at Walnut and looked through the house [76] and did not find Dunaway there, that you went outside and you saw Detective Luciano?

A. Yes, sir, it was the Broad Street house.

Q. I am sorry, did I say Walnut? The Broad Street house.

A. Yes, sir.

Q. Where was Luciano at the Broad Street address?

A. Staying out in the front over by the car. The car was parked on the curb across the street from the house. It would be the east curb.

Q. So, he was—was he standing by the car?

A. In that vicinity.

Q. Was he on the driveway on Broad Street?

A. Not that I recall, sir.

Q. When you came out of Broad Street address, did you go across the street to talk to him at the car?

A. I can't recall, sir, where he was standing at the time I talked to him in the street.

Q. He was in the street?

A. Yes, sir.

Q. Well, of course, by street do you mean—
A. He was in the vicinity of Broad Street, across from the Broad Street address. I can't recall.
Q. Had you asked him to stay in the driveway at Broad Street [77] address?
A. I can't recall. No, sir, I could have.
Q. Did you have any plan at all in three police officers approaching Broad Street as to how you would handle the situation?
A. Well, yes, sir. One policeman would stay out in front and watch the door in case if we knocked somebody came out, yes, sir.
Q. Your intention was to arrest him or seize him or restrict his freedom of moving once you saw him?
A. Our intention was to take him downtown and talk to us.
Q. Whether or not he wanted to come voluntarily, is that correct?
A. Yes, sir.
Q. There is no question about that?
A. No.
Q. Now, you knocked on the door at 102 Walnut?
A. Yes, sir.
Q. At that time did you have a photograph of Dunaway?
A. I can't recall.
Q. You can't recall if you ever had a photograph?
A. I can't recall if I had a photograph.
Q. If you testified at the other trial that you had a photograph, [78] would that be true?
A. Yes, sir, it probably would.
Q. At any rate, when you went to the door, you don't recall whether you had a photograph at all?
A. I don't recall.
Q. You knocked on the door, did you?
A. Yes, sir, I did.
Q. Where was Luciano when you knocked on the door?
A. Standing in the driveway.

Q. Did you tell him to position himself there?
A. I didn't say anything there. He just said I will wait in the driveway.
Q. Did you ever have any conversation with Luciano from the time you left Broad Street to the time you got to Walnut Street?
A. Yes, sir, I did.
Q. What did you say to him?
A. Luciano said to me first, did you see the little girl run out the back door, and I said no, I didn't. He said she ran into that gray house there. I said let's check it out. He might be in there and that is why we walked there. That is in sum and substance our conversation.
Q. You didn't tell Luciano you stay outside?
[79] A. I can't recall.
Q. You didn't go up there haphazardly, you went up there with a plan?
A. Yes, sir.
Q. And your plan was to take him into custody, is that correct?
A. Yes, sir.
Q. After you knocked on the door, Dunaway came to the door, as I understand it?
A. Yes, sir, he did.
Q. Now, this was, do you recall the house at all, have any recollection of this house?
A. It was a gray house.
Q. It was a small cottage-type house?
A. I can't recall that, either. I have not seen that house since.
Q. You have not seen the house since?
A. No, sir.
Q. There are three steps at the house?
A. I can't recall how many steps there were. There was a step up to the door.
Q. You were at the top step. Where you went you knocked on the door?
A. I can't recall that, either.
[80] Q. You mean you could have been?
A. I could have been standing on the sidewalk.

Q. And reached up to knock on the house?
A. Yes, sir.
Q. Is the step that narrow and small you could reach?
A. I can't recall whether I was standing on the step or sidewalk. I knocked on the door.
Q. Mr. Dunaway came out?
A. Yes, sir, he did.
Q. What did you say to him?
A. I said to Dunaway, to the best of my recollection, I said, Dunaway, and he said yes. I said we would like to talk to you downtown.
Q. Did you identify yourself?
A. I believe I did, yes, sir.
Q. You are not sure?
A. I am not sure.
Q. Did you show him—how were you dressed?
A. Just like this, a suit, a sport coat and slacks, tie and shirt.
Q. Did he know you were a police officer?
A. Well, he must have. He came downtown with us.
Q. You are not saying—you are not really sure that you told [81] him you were a police officer?
A. I don't know whether I told him or not. I really can't recall.
Q. Did you tell him why you wanted to talk to him downtown?
A. No.
Q. That is the only conversation you had with him?
A. Yes, sir.
Q. Now, you say you don't recall whether Detective Luciano had a hold of Dunaway's arm or had a hold of him?
A. No, sir, I don't recall.
Q. But you at no time from the time you left the 102 Walnut Street, you walked two blocks to the police car and you at no time had any hand at all, either on the person or the clothing of Dunaway, is that correct?
A. No, sir, I didn't.
Q. You did not have?
A. No, sir.

Q. How about Luciano?
A. I can't recall.
Q. Is there any way I could refresh your recollection as to whether he did or not?
A. I can't recall. I don't know.
Q. You don't know?
[82] A. Luciano was on the one side and I was on the other side. Dunaway was in the middle. I wasn't even facing Dunaway or Detective Luciano.
Q. Are you saying that you were not in a position to observe whether or not he had a hand on him, is that what you are saying?
A. I didn't observe Luciano touch him. I was in a position where I could have, but I didn't.
Q. You never saw Luciano have a hand on him?
A. No, sir.
Q. On his pants or on his belt?
A. No, sir.
Q. Or on his arm?
A. No, sir.
Q. The three of you walked down from 102 Walnut to where your car was, as you say, approximately two blocks away with no handcuffs and no hold of any kind?
A. No.
Q. I take it that he could have run away?
A. Yes, sir.
Q. This is the man you had been searching for for several hours?
A. Yes, sir.
Q. This is the man that you had instructions to definitely [83] pick him up and bring him downtown?
A. Yes, sir.
Q. For what purpose?
A. To talk to him.
Q. To talk to him and you said to Mr. Spires that you would have arrested him, is that correct?
A. Yes, sir.
Q. Then you would have talked to him after you would have arrested him?
A. Yes, sir, if it became necessary to arrest him, yes, sir.

Q. There is no question he was a target?
A. No question about it.
Q. Did you at any time at 102 Walnut or Broad or in the police car at any time that you went to police headquarters, advise him of what you wanted to talk to him about?
A. No, sir.
Q. Did you at any time ever advise him of his right to an attorney or the Miranda rights?
A. No, sir.
Q. When he was in the police car, who was in the back with him, if anybody?
A. I don't recall.
Q. Somebody in the back?
[84] A. Somebody was in the back.
Q. At that point did you have him in custody?
A. Yes, sir.
Q. At that point did you advise him of any rights?
A. No, sir.
Q. Didn't even tell him what that was about?
A. No, sir.
Q. Is it true he asked you and Mr. Luciano why he had to go downtown to be questioned?
A. Yes, sir.
MR. SPIRES: I object to the form of the question.
THE COURT: Overruled.
Q. Did you answer why he had to go downtown?
A. Yes, sir.
Q What did you tell him?
A. I said we wanted to talk to you about something and we will discuss it when we get downtown.
Q. Did you make it clear to him you didn't want to discuss the matter at his home?
A. Yes, sir, at his home, no.
Q. Or at 102 Walnut?
A. No, sir.
Q. You didn't?
[85] A. No, sir.

Q. Did you give him that option? You definitely wanted him to know that you were going to talk to him downtown and nowhere else?
A. I can't recall. I don't believe we had any conversation from 102 Walnut to the police car.
Q. Well, in the police car?
A. In the police car he asked why do you want to see me. I said we will talk about it when we get downtown.
Q. Now, when you got to the police car, that is the police car in front of Broad Street? Where was Ruvio?
A. I can't recall.
Q. You can't recall?
A. No.
Q. At that time did you make any kind of a communication downtown?
A. I can't recall that, either.
Q. Did you ever communicate before you brought him to police headquarters? You had him in custody?
A. I can't recall, possibly.
Q. Now, when you were at the door of 102 Walnut Street, did you or did you not say anything to Luciano that he was in the driveway?
[86] A. I motioned him over and Dunaway was coming out the door, like that.
Q. You didn't say anything?
A. No, sir, I can't recall saying anything.
Q. You can't recall?
A. No, sir.
Q. You didn't say anything, well, I got him and then call?
A. If I testified to that.
Q. I am not saying you testified to it.
A. I can't recall.
Q. Was it possible you said to Luciano I have got him and waved him on to you?
A. Yes, sir, it is possible.
Q. At that point you had not put any hand on Dunaway at all?
A. No, sir.

Q. Was Dunaway trying to run away?
A. No, sir, he wasn't.
Q. What did you call Luciano over for?
A. Procedure.
Q. Procedure?
A. Yes.
Q. How far was Luciano from you?
A. He was in the driveway.
[87] Q. How far was the driveway from the steps?
A. I don't know, ten feet.
Q. Luciano was ten feet away and you called him over to the steps, is that correct?
A. Yes.
Q. Did you do that because you wanted him to assist you?
A. Yes, procedure.
Q. What do you mean by procedure?
A. Well, he would have attempted—if he would have attempted to break away, there would have been two of us there.
Q. He is only ten feet away, is he not?
A. Yes.
Q. You were both armed, were you not?
A. Yes, sir, we were.
Q. And Luciano came over?
A. Yes, sir.
Q. He did nothing?
A. No.
Q. Place no hand—
A. I can't recall.
Q. Luciano can't recall whether you placed a hand on him and you can't recall whether you placed a hand on him?
A. I am sorry, sir, I can't recall. I know I didn't place a [88] hand on him myself. I know I didn't. He came down out of the doorway and walked with us.
Q. But, as far as Luciano is concerned, you have no recollection?
A. No, I don't.
Q. Did you see that little girl again at any time that day at that point?
A. I can't recall seeing her, no.

Q. You can't recall?
A. No, in fact I never saw her. Luciano told me about her. I can't recall seeing her.
Q. Now, this doorway, did you see anyone else at the doorway or was it possible for you to see anyone else at the doorway?
A. Yes, sir. It was—I can't recall. There were other people inside the house. I can't recall.
Q. What time was it that you walked with Mr. Dunaway and the others to the car?
A. It was approximately 8:30.
Q. Were there any other people around that neighborhood?
A. I didn't see anybody.
Q. You didn't see anybody?
A. No, sir.
[89] Q. You didn't see Ruvio?
A. Ruvio was by the car.
Q. Now, when you got to police headquarters, what did you do with Dunaway, if anything?
A. We got to police headquarters, Detective Novensky took over and we were told by Captain Cavoti to go home.
Q. Did they know you were going to arrive?
A. Yes, sir.
Q. How did you communicate your expected time of arrival?
A. We must have called on the air. I can't recall. I will have to listen to the tapes.
Q. Do you have any recollection of what you said?
A. No, sir, I don't.
Q. You must have said you caught him or captured him or seized him or something like that?
A. Possibly.
Q. But, at any rate, Novensky was waiting for you?
A. With other detectives.
Q. Did you then have anything else to do with Dunaway after you turned him over to the police?
A. No, sir, I didn't.

Q. Up to the point that it was turned over to Detective Novensky, did you or anybody in your presence advise him [90] of any rights?

A. No, sir.

Q. Had you placed him under arrest formally?

A. No, sir.

Q. Now, this was August 11, 1971, is that correct, when you picked up Dunaway?

A. Yes.

Q. That was approximately how many months after the incident?

A. I can't recall the incident. It was in the spring time. I believe it might have been about in March 26th, yes.

Q. This was some distance from the scene of that incident, is that correct?

A. Yes, sir.

Q. A mile and a half or two miles away, something like that?

A. Yes, sir.

MR. CRIMI: May I have a moment?

THE COURT: Yes, Mr. Crimi.

MR. CRIMI: I guess that is all.

MR. SPIRES: May counsel approach the bench?

THE COURT: Certainly.

(Whereupon there was an off the record discussion.)

REDIRECT-EXAINATION

BY MR. SPIRES:

Q. Did I hear your testimony when Dunaway was in the police [91] car that you considered him to be custody?

A. He was in the police car. I asked him to be in custody.

Q. In your mind as a police officer, is there any difference between somebody being in custody and somebody being under arrest?

A. Yes, sir.

Q. Can you explain the difference as far as you understand it?

A. If a person is placed under arrest, the procedure, as I follow, you handcuff him in the car. A person in custody going in for an interview, is not handcuffed and placed under arrest. He comes voluntarily.

Q. When you arrest somebody you handcuff them, that is your procedure?

A. Yes.

Q. What is the purpose for handcuffing a person?

A. So he dosen't attempt to get away.

Q. Hadn't you already testified that you would have followed those same procedures to prevent Dunaway from getting away?

A. Yes, sir.

Q. So, as a practical matter, is it fair to say that Dunaway was really under arrest but hadn't been handcuffed?

A. No, he was in custody for an interview, an interrogation.

Q. Do you mean he had not been arrested and charged with a [92] crime, is that what you mean?

A. That is what I mean.

MR. SPIRES: No further questions.

RECROSS-EXAMINATION

BY MR. CRIMI:

Q. Are you saying he was not free to go at any point, is that correct?

A. That is what I am saying.

Q. But in your mind he was not under arrest?

A. I didn't formally place him, no.

Q. Formally?

A. No.

Q. But as a practical matter, from the time you walked him from 102 Walnut Street to the police car, he was in your custody and Luciano's?

A. Yes, sir, he was in our custody, yes, sir.

Q. He was in your physical custody, you were both there?
A. We were both there.
Q. Had he tried to run you would have taken appropriate measures?
A. Yes, sir.
Q. What would those measures have been?
A. Apprehended him.
Q. To apprehend him?
[93] A. Yes, sir.
Q. There is no question in your mind his freedom of movement was definitely restricted from that point on?
A. Yes, sir.
Q. But you didn't consider him to be under arrest because you didn't formally say to him you are under arrest?
A. Right, sir.
Q. Informally you knew he was under arrest?
A. Informally, yes.
Q. In other words, the difference between formal and informal are the magic words that I am applying to you under arrest?
A. Yes.
Q. That is the only difference we are talking about?
A. Yes, sir.
Q. Plus the handcuffs?
A. Yes.
Q. Plus the handcuffs?
A. Yes.
Q. But handcuffs or not, handcuffs, had he tried to get away, you would have either taken whatever measures you thought necessary to capture him?
A. I had orders to bring him in, yes, sir.
Q. Pardon?
[94] A. I had orders to bring him in, yes, sir.
Q. Those orders were definite?
A. Yes, sir.
MR. CRIMI: I don't have any further questions.
MR. SPIRES: If he had attempted to run away, would you have handcuffed him then?
THE WITNESS: Probably, yes.

MR. SPIRES: According to your previous definition of an arrest, he would have been arrested?
THE WITNESS: If he would have tried to get away, yes, sir.
MR. SPIRES: Even though he would not have been charged with any form of crime, you would consider him under arrest?
THE WITNESS: Yes, sir.
MR. SPIRES: Nothing further.
THE COURT: If you wanted to place Dunaway under arrest, what procedure would you follow from the time he came out of the door?
THE WITNESS: I would have said Dunaway, if he identified himself as Dunaway. I would have said we would like to talk to you downtown.
THE COURT: This is if you were going to formally arrest the Defendant?
[95] THE WITNESS: Yes, sir, if he refused to come downtown, then I would take other action.
THE COURT: Would you have told him he was under arrest or intended to arrest him?
THE WITNESS: Sometime if I have a warrant in my pocket, I would.
THE COURT: So, your procedure varies when you make an arrest?
THE WITNESS: Personally, yes. My procedure does.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. Were you told by Lieutenant Fantigrossi to go out and arrest him?
A. I was told by Fantigrossi to go out and pick him up.
Q. He definitely told you to pick him up?
A. Yes, sir.
Q. There is no question you had to bring him back?
A. No question.
Q. Whether he came voluntarily or not, you wanted him back there?
A. Yes, sir.

Q. That is how you understood Fantigrossi's order?
A. Yes, sir.

REDIRECT-EXAMINATION BY MR. SPIRES:

[96] Q. May I assume correctly, Detective, that there is some time when you are directed by your superiors to go out and bring somebody in when there is an arrest warrant for such a person?
A. Yes, sir.
Q. And in all such cases, are you given either the arrest warrant or a copy of the arrest warrant?
A. Yes.
Q. Each case?
A. I am not given a copy of it, I know one is on file or I take a copy with me.
Q. Sometimes knowing one is on file, you go out not having a piece of paper?
A. Yes, sir.
Q. On those occasions, what are your instructions?
A. Pick him up and bring him in.
Q. The instructions are not to arrest him?
A. Pick him up and bring him in.
MR. SPIRES: Thank you.

RECROSS-EXAMINATION BY MR. CRIMI:

Q. In other words, if there is an arrest warrant on file your instructions are to pick him up and bring him in, the same instructions you got from Fantigrossi in this [97] case?
A. Yes.
Q. Was there an arrest warrant filed here?
A. No, sir.
MR. CRIMI: Thank you.
THE WITNESS: May I explain something?
THE COURT: That is up to the attorneys.
THE WITNESS: May I explain something? It is my procedure, I don't go into a place to arrest somebody. If I got an investigation going and I walk into a barroom or wherever I locate that person, I am not in the habit

of saying you are under arrest, you are coming downtown with me. I usually say, sir, I would like to talk to you outside, like that.
MR. CRIMI: Even though there is an arrest warrant for him?
THE WITNESS: Even though there is an arrest warrant, I rather do it that way rather than start a commotion someplace where I can't handle it.
MR. CRIMI: In that case you had Luciano in the driveway?
THE WITNESS: Yes, sir.
Q. And you weren't in a barroom?
[98] A. Yes, sir.
Q. How tall is Luciano?
A. Taller than me.
Q. How tall are you?
A. Six foot three.
Q. How much do you weigh?
A. 205.
Q. And Luciano?
A. He is a little heavier than I am.
MR. CRIMI: That is all. I want the Court to know, subject to my looking at the police reports, that I want to ask Mickelson something.
THE COURT: Reserved.
MR. SPIRES: At this time, on the basis of the testimony of the People's own witnesses at this hearing, I find that the People cannot in good conscience do otherwise than to stipulate at the present time on the morning of August 11, 1971 the Defendant, Irving Jerome Dunaway was in the physical custody of the detectives of the Rochester Police Department from the time that he left with two such detectives from 102 Walnut and until and including the time he reached the Detective [99] Division at police headquarters.

Also stipulate if he had attempted to leave the presence of the police officers at any time during that period, he would have been restrained physically and handcuffed, if necessary.

Now, the police witnesses this morning testified that he was not normally under arrest and the last witness

testified he was in custody. But, as an Appellate lawyer, I cannot find in the real distinction in contemplation of the law of arrest as to whether or not the term "arrest" is used under the circumstances.

THE COURT: Will you accept that?

MR. CRIMI: I accept that in view of that stipulation that it would appear to me that there would be no value to present witnesses that would testify to the Defendant being put into physical custody, since I believe that stipulation makes it a matter of law.

THE COURT: My understanding is this hearing is concluded?

MR. CRIMI: The hearing is concluded. However, obviously, I am not sure of the procedure, either by the judicial notice or otherwise. The record of the [100] testimony of all of the witnesses, including Mr. Dunaway's testimony, should be considered part of this.

THE COURT: The Court will take judicial notice the minutes of the pretrial suppression hearing conducted in this case.

MR. CRIMI: What I want to say, if the Defendant Dunaway were called to the stand today he would testify in the same fashion and manner he testified previously at the trial as well as the suppression hearing.

MR. SPIRES: That is a conclusion on your part unwarranted that evidence is before the Court.

MR. CRIMI: That is what I mean, unless you want me to put him on the stand.

THE COURT: The Court takes judicial notice of Mr. Dunaway's prior testimony at the pretrial suppression testimony.

MR. CRIMI: Possibly at the trial all of these matters were going into, both at the trial to some extent—

THE COURT: The Court takes judicial notice of the transcript of the trial as far as Dunaway's examination is concerned.

[101] MR. SPIRES: Yes, that is proper. The proofs are closed as far as the People are concerned.

THE COURT: Your rights are reserved to submit additional proof, Mr. Crimi.

MR: CRIMI: I will not argue about the sufficiency of the People's case at this point. I would have to examine the record or maybe I will suspend that for some other time. In other words, I am going to have to order these minutes plus look at the other minutes to address as to whether or not this legally is as what your decision should be.

Does your Honor want briefs on this matter, is what I am trying to say?

THE COURT: Yes.

MR. CRIMI: I am trying to say at a hearing normally there is a motion made saying that everything should be suppressed. I am saying that I am not prepared to make the motion at this point. I can't make it in depth. I don't have, on my fingertips, all the testimony at the previous hearing incorporated in this hearing, but my motion would be, then, in view of the fact he was [102] or he is now stipulating that he was in physical custody from the point of his apprehension at 102 Walnut, that he was not at any time advised of any rights until he was delivered to police headquarters at around 9:00 o'clock.

If my recollection serves me correctly, I think if my recollection of the record serves me correctly, shortly after he arrived at police headquarters for a period of five or ten minutes there was conversation in which it was done without advisement of counsel and again, if memory serves me correctly, Dunaway testified at the trial that he was not advised of his rights until the stenographer came in to take a stenographic statement which was approximately 10:30 in the morning.

Detective Novensky testified he did advise him orally of his rights five or six minutes after he arrived at headquarters. That a second statement was taken later on that day and that as a consequence of the manner which he was taken into custody, into the physical custody and the time it expired while he was in [103] such physical custody without any advice of his rights. This was a primary illegality which tainted the receipt of the confession as well as I recall two diagrams.

I suppose what the Court is going to have to decide is wheher or not the so-called information that was received by Lieutenant Fantigrossi was sufficient to cause the physical apprehension of the Defendant and my view is it was hearsay far removed from the actual declarant.

Also, if my recollection serves me, neither of the two informants were in any form or fashion reliable. I believe that Major Fantigrossi testified he had no previous contact with the informant. The record will show quite clearly one of the informants had indicated that a conversation with another individual had been to the effect that a James Cole was one of the participants in this incident, but later on it was found that James Cole was not a participant in this incident. It was a result of which indicates to me that the informant was not reliable [104] and that is to say that at least five percent of what he told the police was not true. There is no previous reliability established.

Based on this double or triple hearsay and based on the legality, it would appear to me it was insufficient probable cause to put the Defendant into physical custody and the type of detention here. For the period of time, I don't think it can be justified for or by the information that was in possession of the police.

I, further, would like to point out to the Court that apparently these police officers had been to Dunaway's house on Broad Street two or three times previous to 8:00 o'clock. That they had searched through the house looking for Mr. Dunaway. At no point in any of these proceedings did the police have any arrest warrant or any search warrrant whatsoever.

I think the Court can take judicial notice that on the fact both Detectives Mickelson and Luciano are of sufficient height and girth to have handled the situation quite readily, al- [105] though I should not dwell on that. There is a stipulation that he was in physical custody.

Based on all that I think this hearing should result in the exclusion of the confession and the diagrams and also the two confessions and I think one of the cases that has to be looked into is *Brown versus Illinois*. It is a case that caused this case to be remanded to this Court.

I think, generally speaking, a broad view of the *Brown versus Illinois* and I know there is going to be some factual distinction. Where there has been an arrest of an individual that is not based upon probable cause, that that is a primary illegality and as a consequence of that illegality, anything that is taken, such as a confession or seizure of evidence can become excluded.

I think I rest on that case. That is my motion and if it is necessary to brief the matter, I will be happy to brief the matter given some time to do so.

THE COURT: Thank you, Mr. Crimi.

MR. SPIRES: Your Honor, I respectfully submit to the [106] Court the issue of the voluntariness of the statement and hand drawings given by Dunaway to the police, the voluntariness aspect, not the admissibility, but the voluntariness of it has already been determined by Judge Ogden in his law of the case in the matter. I am prepared to submit authority to that effect, if the Court so desires.

There is also the appeal evidence in the trial record including Dunaway's open admission they were given voluntarily.

Now, as to the admissibility and to whether or not this Court may now find contrary to Judge Ogden's earlier finding that the statement or the hand drawings or both were not admissible or should not have been admitted into evidence at the trial and is now entitled to a new trial. There are three broad concepts which the People could seek to justify the admissibility.

One is the concept of voluntary consensual accompaniment of the police by Dunaway down to police headquarters. I think as a result of this hearing we have had before your Honor, that the [107] concept has been removed as something we can argue.

The second is that even though the police took him into custody or detained him, that he had legal reasonable cause to do so under the concept of *People versus Morales*, 22 N Y 2d, 55 and cases which have followed that as cited in the District Attorney's brief on remand to the Court of Appeals.

I submit this case falls squarely within that concept and falls squarely within the fact situation complied by the Court of Appeals when they decided the *People versus Morales.*

The third concept is that the police did in fact have probable cause to arrest Mr. Dunaway. If such probable cause were to exist, it would have to exist on the basis of the information Detective or Major Fantigrossi testified yesterday. I think it is not quite the way Mr. Crimi puts in. For example, we don't hear what Mickelson's informant said or what Detective Mickelson said because Fantigrossi then went directly to this Mr. Cole and spoke to him.

We have triple hearsay. Cole testified to [108] what a man named Adams told him that Adams younger brother had confessed to implicating a co-defendant, Irving Dunaway. This is triple hearsay.

We have as precedent for triple hearsay supporting probable cause, two arrests, the Fifth Circuit, *U.S. versus Romano*, 482 Fed. 2d, 1183. Whether or not the fact of this case can be brought within the holding of that case, I don't know. It depends on following the trial of reliability from one hearsay informant to another. I think that is a matter which we would have to do a little research on. I am not foreclosing that as a possibility for justifying the admissibility. I am relying on *People versus Morales.*

THE COURT: Thank you.

Decision is reserved. The Court is in recess.

MR. SPIRES: May we stay on the record, your Honor? There is another matter to be considered and that is whether or not Mr. Dunaway's continued presence in Rochester is appropriate. Also, this will in turn depend on what options this [109] Court has by virtue of the Court of Appeals remand. It seems to me that the directions given to the Court were to make findings of fact at this hearing and then presumably to file the decision in the County Clerk's Office. I must admit I am not clear on the post hearing procedures.

MR. CRIMI: Neither am I. I assume we will have to call the Court of Appeals and find out what they want.

I don't know whether your findings of fact are filed with them and they review them or whether we go through—

MR. SPIRES: I am wondering if it might not be appropriate to return Dunaway to the facility from whence he came. This Court has such a tremendous backlog on the matter that it has reserved decision and the Order mandated that the proceedings here be concluded within thirty days.

THE COURT: It is the Court's contention to make findings of fact and determination as to the admissibility of the confession.

MR. SPIRES: We understand. What about Dunaway? Do you want him to remain in Rochester?

[110] THE COURT: I don't think there is any reason for Mr. Dunaway to remain in Rochester. If it becomes necessary at some future date we could bring him back under a Court Order.

MR. CRIMI: Is there any reason he can't? Is there any financial reason?

MR. SPIRES: It is up to the Court whether he remains here.

MR. CRIMI: May I aproach the bench?

(Whereupon there was an off the record discussion.)

THE COURT: It is the direction of the Court that the Defendant be returned to Great Meadow Correctional Facility on or after August 19, 1976.

The Court is in recess.

END OF TESTIMONY

[Court Reporter's Certificate (omitted in printing).]

STATE OF NEW YORK
COUNTY OF MONROE
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

—*vs.*—

IRVING JEROME DUNAWAY

DECISION—March 11, 1977

MARK, J. The defendant was convicted of Murder in violation of Section 125.35(3) of the Penal Law, and he appealed. Following affirmance of this conviction by the Appellate Division, Fourth Department, and by the Court of Appeals, the U.S. Supreme Court granted certiorari.

The U.S. Supreme Court then remanded this case to the Court of Appeals *Dunaway* v. *New York*, 422 US 1053, "for further consideration in light of *Brown* v. *Illinois*, 422 US 590", and the Court of Appeals ultimately remitted to this court for further proceedings to determine if the defendant's inculpatory statements and sketches were the result of an illegal detention *People* v. *Dunaway*, 38 NY2d 812.

Pursuant to such direction, a post-trial evidentiary hearing as held at which the following facts relative to the defendant's detention were adduced:

> Philip C. Argento was murdered on March 26, 1971. On August 10, 1971, then Lt. Anthony L. Fantigrossi received information from a fellow police officer that an informant (named) had told him that one James Cole had told the informant that Irving (no surname) and himself (Cole) were involved in the murder. Cole was interviewed by Lt. Fantigrossi, but he denied any involvement.
>
> However, Cole stated that approximately two months earlier Hubert Adams had informed him that Adams' brother "Ba Ba" Adams and Irving a/k/a "Axelrod" (no surname) were responsible for the murder of Mr. Argento and that he had received this information from "Ba Ba" Adams. Having acknowledged that Irving a/k/a "Axelrod" was the defendant, Fantigrossi ordered detectives to find the defendant and bring to police headquarters for questioning.
>
> The defendant was located by three detectives on August 11, 1971, but he was not arrested. However, he was in the physical custody of such detectives from the time of the initial contact until he reached police headquarters, and had he attempted to leave the company of the said detectives, they would have physically restrained him (per stipulation of People at conclusion of hearing).

Based upon the above, there can be no doubt that this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police *Oregon* v. *Mathiason*, —— US ——, 1/25/77, or where the defendant was merely escorted to police headquarters by the police *People* v. *Brown*, 86 Misc2d 339.

There is also no question that the inculpatory statements and sketches made by the defendant were voluntary *People* v. *Huntley*, 15 NY2d 72, and that there was full compliance with the mandate of *Miranda* v. *Arizona*, 384 US 436. These findings were made at a hearing held prior to trial and of course became the law of the case *People* v. *Blake*, 35 NY2d 331.

The People argue that the Court of Appeals in *People* v. *Morales*, 22 NY2d 55, held that the police could detain a defendant for custodial questioning on less than probable cause to arrest. However, the U.S. Supreme Court on appeal in *Morales* v. *New York*, 396 US 102, "declared in no uncertain terms that it was not ready to adopt the ruling of the New York Court of Appeals that the state may detain for custodial questioning on less the probable cause for a traditional arrest." *People* v. *Mitchell*, NYLJ, 1/21/77, p. 14, c. 5.

Upon remand from the U.S. Supreme Court, the trial court after a post-conviction hearing determined the

defendant had been arrested on probable cause, but even if he had not, his detention for a reasonable and brief period was proper *People* v. *Morales*, NYLJ, 5/21/71, p. 18, c. 2. This decision was affirmed by the Appellate Division, First Department, without opinion although there were two lengthy concurring opinions and one strong dissenting opinion *People* v. *Morales*, 52 AD2d 818. Leave to appeal was granted by the Court of Appeals on June 16, 1976. (It may well be that the result of this appeal will not be a definitive ruling because of the finding of probable cause to arrest by the trial court *People* v. *Chappel*, 38 NY2d 112.)

Subsequent to its decision in *Morales* v. *New York*, supra, the U.S. Supreme Court in *Brown* v. *Illinois*, 422 US 590, issued another opinion in this complex area. In that case police officers obtained the defendant's name from the victim's brother as an acquaintance of the victim and not as a suspect. The defendant was arrested without probable cause and without a warrant and confessed after being given the prescribed *Miranda* warnings. It was held that the defendant's inculpatory statements were the product of an unlawful seizure of his person in violation of the Fourth Amendment and were therefore inadmissible.

In so ruling the U.S. Supreme Court used strong language to indicate its disdain for custodial questioning without probable cause to arrest: "The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning . . . ." The arrest, both in design and in execution, was investigatory, 422 US at 605." If *Miranda* warnings . . . . attenuate the taint of an unconstitutional arrest . . . . Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged . . . ." 422 US at 602.

In view of the holding of the U.S. Supreme Court in *Brown* v. *Illinois*, supra, it is problematical whether the decision of the Court of Appeals in *People* v. *Morales*, supra, is still the law of New York. However, the post-

Brown decisions of our courts have not established any pattern of preciseness in this area.

People v. *Martinez*, 37 NY2d 662, citing *Brown* held that although the arrest on one charge was illegal, questioning about another unrelated charge on the basis of independent evidence was proper. The dissenting opinion of the Appellate Division in *People* v. *Morales*, supra, asserted flatly that ". . . . all debate on that provocative question has now been foreclosed by the very recent authoritative holdings in *Brown* v. *Illinois* (citation omitted); and *People* v. *Martinez* (citation omitted);" the two concurring opinions adopted the rationale of the Court of Appeals in *Morales*. In *People* v. *Lee*, 84 Misc 2d 192, *Morales* was cited with approval but it was acknowledged that its concept had not received U.S. Supreme Court acceptance. *People* v. *Mitchell*, supra, stated unequivocally that *Brown* is controlling law in this state.

Regardless of whether *People* v. *Morales* is still a viable concept in this state, this court is bound by the mandate of the U.S. Supreme Court in *Dunaway* v. *New York*, *supra*, and the Court of Appeals in *People* v. *Dunaway*, supra.

As has been stated previously, the U.S. Supreme Court remanded this case to the Court of Appeals "for further consideration in light of *Brown* v. *Illinois* (citation omitted)." The Court of Appeals remitted this case "for a factual hearing . . . . and, in the event there was a detention and probable cause is not found for such detention, to determine the further question as to whether the making of the confession was rendered infirm by the illegal arrest (see *Brown* v. *Illinois* (citation omitted))." In this context the term "arrest" has been used by that Court as synonomous with the term "detention."

Thus, both the U.S. Supreme Court of the United States and the Court of Appeals have directed this court to resolve the issue of probable cause in this case pursuant to *Brown* v. *Illinois*, supra. It should be considered significant that the Court of Appeals made no reference to *People* v. *Morales*, supra, in the direction contained in its remittur, so that case is of no moment here. This

is the posture, therefore, in which the factual pattern of the instant case should be analyzed.

It is true that the statement by "Ba Ba" Adams to his brother Hubert Adams was a declaration against the former's penal interest *People* v. *Brown*, 26 NY2d 88, but it is not a declaration against the defendant's penal interest. There was no showing as to the reliability of either Hubert Adams or James Cole *Spinelli* v. *United States*, 393 US 410; *Aguilar* v. *Texas*, 378 US 108. Also, Lt. Fantigrossi received this information approximately four and one-half months after the murder, so it was stale *Sgro* v. *United States*, 287 US 206. The triple hearsay in *United States* v. *Romano*, 482 F2d 1183, and the statement of an accomplice to the police implicating the defendant in *People* v. *Logan*, 39 Misc 2d 593, both of which were found acceptable as probable cause, are readily distinguishable.

In the first *People* v. *Morales* the police had information that the defendant was present in the apartment building at the time of the murder, that he was a known narcotics addict, that he constantly frequented the building and he had not been seen since the killing. The triple hearsay present here might possibly be equated with the paucity of factors found to be probable cause by the Court of Appeals but denied sanction by the U.S. Supreme Court. However, it cannot be gainsaid that it falls far below the square adduced by the trial court in *Morales* on remand. In fact, *one* of the more than ten items of information received by the police in that case was a statement from a narcotics addict who knew the defendant well that the defendant was the killer. It is not clear whether this was single or multiple hearsay, but this was a minute part of the information available to the police; by itself it would most assuredly have been insufficient.

Since *People* v. *Martinez*, supra, rested upon the attenuation theory, the Court of Appeals emphasized that the police had independent evidence linking the defendant to the murder and this served to break the causal chain between his unlawful arrest and his interrogation. This evidence consisted of a female friend of the defendant

stating to the police that the defendant had admitted the stabbing to her; a search of the defendant's apartment during which the victim's coat and a switchblade knife were found; and "people in the street" informing the police of the defendant's involvement in the murder. All of this evidence was available to the police within six days after the murder.

While this was not a pivotal point in *Martinez*, because the defense emphasis was on the illegality of the defendant's arrest on the first charge, it is manifest that the evidence there was much more than the triple, unreliable and stale hearsay upon which the defendant's detention was predicated in the instant case.

This case is very analogous to *People* v. *Mitchell*, supra. There the police received a message from the victim to the effect that he had been told that the defendant or one of his associates had been overheard bragging of having committed the burglary at the victim's house. Based upon this hearsay information the defendant was taken into custody and confessed after being given the *Miranda* warnings. The court concluded that the arrest of the defendant was founded solely upon hearsay and rumor not giving rise to probable cause and the confession was inadmissible.

Accordingly, the factual predicate in this case did not amount to probable cause sufficient to support the arrest of the defendant.

(In fact, for whatever its import, the police at the post-trial hearing conceded that the information in their possession did not constitute sufficient probable cause for the arrest of the defendant.)

Since the *Miranda* warnings by themselves did not purge the taint of the defendant's illegal seizure *Brown* v. *Illinois*, supra, and there was no claim or showing by the People of any attenuation of the defendant's illegal detention *People* v. *Martinez*, supra, the defendant's statements and sketches are inadmissible.

Therefore, by virtue of the federal and state decisional law applicable to the instant case, this court is considered to grant the defendant's motion to suppress his inculpatory statements and sketches.

This decision constitutes the order of the court.

Dated: Rochester, New York
March 11, 1977

/s/ Donald J. Mark
DONALD J. MARK
Monroe County Court Judge

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., MOULE, CARDAMONE, DENMAN, WITMER, JJ.

PEOPLE OF THE STATE OF NEW YORK, APPELLANT

v.

IRVING JEROME DUNAWAY, RESPONDENT

The above named People of the State of New York, plaintiff in this action, having appealed to his Court from an order of the Monroe County Court, entered in the Monroe County Clerk's office on March 11, 1977 and said appeal having been argued by Melvin Bressler of counsel for appellant, James Byrnes of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be, and the same hereby is reversed and the motion is denied.

Opinion by Moule, J., which is hereby made a part hereof; Marsh, P.J. and Witmer, J. concur; Denman, J. concurs in an Opinion; Cardamone, J. dissents and votes to affirm the order in an Opinion.

Entered: March 1, 1978

MARY F. ZOLLER
Clerk

SUPREME COURT OF NEW YORK
APPELLATE DIVISION

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT

v.

IRVING JEROME DUNAWAY, RESPONDENT

Fourth Department, March 1, 1978

OPINION OF THE COURT

MOULE, J.

This is an appeal by the People from an order granting defendant's motion to suppress certain inculpatory statements and sketches made by him in which he admits his involvement in the murder of a pizza shop proprietor.

On March 26, 1971, two men entered a pizza shop in Rochester and, in the course of an attempted robbery, one of them shot and killed the proprietor. Four months later, on August 11, 1971, three police officers went to defendant's home to question him about his participation in the robbery. According to the police testimony, defendant was asked to come downtown to talk and did so voluntarily. Defendant was taken to police headquarters where he was placed in an interrogation room and given his *Miranda* warnings. He then waived his right to counsel and consented to talk to the detectives. He made an incriminating statement, which was repeated for a stenographer. He also made two sketches useful to the prosecution. The following day defendant asked to see one of the police officers and made a second more complete statement.

Defendant was indicted on two counts of murder and one count of attempted robbery. Following a hearing on defendant's motion to suppress his statements and sketches, the motion was denied. After a jury trial defendant was convicted of felony murder and attempted robbery and sentenced to a term of 25 years to life on the murder count and a maximum term of 15 years on the attempted robbery count, the sentences to run concurrently. Defendant appealed his conviction and this court and the Court of Appeals affirmed, without opinion (42 AD2d 689, 35 NY2d 741). The Supreme Court of the United States granted certiorari and thereafter vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Brown* v. *Illinois* (422 US 590) (*Dunaway* v. *New York*, 422 US 1053). The Court of Appeals remitted the case to the Monroe County Court for a factual hearing on whether defendant was detained and, if so, whether there was probable cause for the detention and, if there was a detention and probable cause was not found, whether the making of the confessions and the accompanying sketches were rendered infirm by the illegal arrest (*People* v. *Dunaway*, 38 NY2d 812, 813-814). It is from the decision and order of the County Court granting defendant's motion to suppress his statements and sketches that the People appeal.

We believe that this case is controlled by the recent decision of the Court of Appeals in *People* v. *Morales* (42 NY2d 129) in which the court rearticulated the views expressed in its earlier *Morales* decision (22 NY 2d 55) that "[l]aw enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights" (42 NY2d, at p 135). "'[A] policeman's right to request information while discharging his law enforcement duties will hinge on the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter'" (42 NY2d, at p 137, quoting from *People* v. *DeBour*, 40 NY2d 210, 219).

[1] Here, based upon information supplied to the police by an informant, who had picked out a picture of defendant from a file of photographs, the police questioned an individual who was serving time in jail and who informed them that defendant and one Adams had participated in the robbing and shooting of the pizza shop proprietor. Although this hearsay information did

not constitute probable cause to arrest defendant, in our opinion, it certainly raised a "reasonable suspicion" in the minds of the police so as to warrant their detention of defendant for questioning under *Morales*.

Furthermore, the record, which includes the transcripts of both suppression hearings, shows that defendant was picked up at approximately 8:00 A.M. on August 11, 1971 at a house on Walnut Street. According to the testimony of the police officers, they approached defendant at the house and asked him if he would come downtown to talk with them. The police assert that they never touched or abused defendant and that as they drove downtown to the station, they never spoke to defendant. When defendant arrived at the police station he was placed in an interviewing room and at about 9:00 A.M. was given his *Miranda* rights. Allegedly he told the police that he understood his rights and that he consented to waive them and discuss the matter. Most importantly, defendant testified at the suppression hearing before the trial that he was not threatened or abused by the police and that the statements he made to them were voluntary.

[2] This testimony shows that the police legally detained defendant for questioning and that such questioning was fair, reasonable, within proper limits and under carefully controlled conditions which were ample to protect his Fifth and Sixth Amendment rights. Moreover, as in *Morales*, the crime committed here was a brutal and henious felony, the period of detention was brief and defendant was fully advised of his constitutional rights. We are not dealing here with a situation where the defendant was arrested, searched and accused of a crime without even a scintilla of evidence casting suspicion upon him (see *Brown* v. *Illinois*, 422 US 590, *supra*; *People* v. *Martinez*, 37 NY2d 662). Rather, this case involves a brief detention for interrogation based upon reasonable suspicion, where there was no formal accusation filed against defendant and where great public interest existed in solving a brutal crime which had remained unsolved for a period of almost five months (*People* v. *Morales*, 42 NY2d 129, 136, *supra*). In our

opinion, the police conduct here is proper under *Morales*.

[3] Further, even if we were to find that the actions of the police officers constituted an illegal detention of defendant, there was a sufficient attenuation of this primary taint to render the subsequent inculpatory statements and sketches admissible. As the Supreme Court stated in *Brown* v. *Illinois* (422 US 590, 603, *supra*) "[t]he question whether a confession is the product of a free will * * * must be answered on the facts of each case. No single fact is dispositive." Although the court stated that the giving of *Miranda* warnings, by itself, does not always purge the taint of an illegal arrest, the *Miranda* warnings are an important factor in determining whether the confession is obtained by exploitation of an illegal arrest (422 US 590, 603, *supra*). Other factors that are relevant are the temporal proximity of the arrest and confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct (422 US 590, 603-604, *supra*). Defendant's testimony that he was never threatened or abused by the police and that the statements he made to them were voluntary, along with the police testimony concerning the fact that defendant was given his *Miranda* rights, lend strong support for the conclusion that defendant's confessions were the product of his free will and that the police conduct here, subsequent to defendant's initial detention, was highly protective of defendant's Fifth and Sixth Amendment rights. Moreover, the police conduct here in detaining defendant was in no manner flagrant as that in *Brown* where the defendant was formally arrested at gunpoint without probable cause and the police broke into his apartment and searched it. The defendant in *Brown* was arrested and charged with the crime simply because he was an acquaintance of the victim. The police made virtually no investigation and had no grounds for even suspecting that the defendant was involved in criminal activity. Here, defendant was a suspect and the police did have a reasonable suspicion that he was involved in the crime

being investigated. More importantly, defendant was never arrested or formally charged prior to his being given his *Miranda* rights. We believe that the statements and drawings made by defendant were of sufficient free will to purge the primary taint of any unlawful detention that may be said to have taken place and should not be suppressed.

Accordingly, the order granting defendant's motion to suppress should be reversed and the motion denied.

DENMAN, J. (concurring). I concur with the result reached by the majority as I believe this case is controlled by *People* v. *Morales* (42 NY2d 129). The police were at a stalemate in their investigation of the murder of the proprietor of a pizza parlor which had taken place some months before. A previously known informant, "Sparrow", told them that while he had recently been in jail, an inmate gave him information that "Irving", also known as "Axelrod", and two others, were responsible for the pizza parlor murder. The police verified that information by interviewing the inmate. "Sparrow", who said he knew Irving, picked defendant's picture from a group of mug shots. This was the only lead the police had in furtherance of their investigation. It seems to me that failure to question defendant at that point would have been contrary to responsible police conduct.

By defendant's own testimony, he was picked up, told that he would be questioned at headquarters and was not threatened or intimidated. He was placed in a room with the interrogation officer at approximately 9 o'clock in the morning, told of the nature of the inquiry and given his *Miranda* warnings. He made an incriminating statement shortly after 10 o'clock which he testified was voluntary, and later made some sketches relevant to the crime.

These circumstances seem to me to qualify as those "exceptional circumstances, given the public interest in solving a brutal and heinous crime", under which "[l]aw enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and

brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights." (*People* v. *Morales*, *supra*, at pp 135-136.)

The dissent believes *Morales* is inapplicable because the detention here was involuntary, purely investigatory and defendant was a "novice" in police procedures. In my opinion, the thrust of *Morales* is that police may have some latitude in exercising their investigatory responsibilities to solve serious crimes as long as their conduct is *reasonable* and carefully limited so as to insure a defendant's Fifth and Sixth Amendment rights. Rights protected by the Fourth Amendment are not violated until the conduct of the police becomes *unreasonable*.

I believe the circumstances of defendant's detention met those standards and therefore vote with the majority. Nevertheless, I must depart from the majority view that defendant's confession is admissible even if he were illegaly detained. The fact that defendant's confession was voluntary and that his Fifth and Sixth Amendment rights were not violated is, in my view, not controlling.

If the detention of defendant was not reasonable under the rule of *Morales*, he was then the victim of an unlawful arrest in violation of the Fourth Amendment and his confession, as the product of such arrest, would have to be suppressed. Under the standards of *Brown* v. *Illinois* (422 US 590), and *People* v. *Martinez* (37 NY2d 662) there were insufficient intervening circumstances to attenuate the confession and remove the tainted effect of the arrest if it were found to be unlawful. (See *People* v. *Burley*, — AD2d — Jan. 20, 1978.)

CARDAMONE, J. (dissenting). The proprietor of a small pizza shop in Rochester was shot and killed during an attempted robbery. Several months later a police lieutenant heard a rumor from a fellow officer that an informant indicated that one James Cole was involved. The officer questioned Cole who told him that two months earlier he had been informed by Hubert Adams that his brother "BaBa" Adams and Irving, also known as "Axlerod" (no surname), were responsible for the murder.

According to Cole, Hubert Adams said that he had received this information from his brother "BaBa". Rather than following up these leads either to Hubert Adams or "BaBa" Adams, the police lieutenant instead directed detectives to find the defendant, Dunaway, and bring him to police headquarters for questioning. Two plainclothes detectives, both six foot three inches or taller and weighing in excess of 200 pounds, picked up Dunaway, a five foot seven inch 130 pound 18 year old at his home. The People stipulated that defendant was in the detectives' physical custody until he reached headquarters and that had he attempted to leave their company the detectives would have physically restrained him.

Dunaway was given the usual *Miranda* warnings upon his arrival at headquarters. Shortly thereafter he made an incriminating statement, which was repeated for a stenographer. He also made two drawings useful to the prosecution. The following day Dunaway asked to see the detective and made a second, more complete statement. Both statements and the drawings were ruled admissible and introduced into evidence at trial. Dunaway was convicted of murder and attempted robbery. This court (42 AD2d 689) and the Court of Appeals (35 NY2d 741) affirmed, without opinion.

On appeal, the United States Supreme Court (422 US 1053) remanded for consideration of whether the detention of Dunaway prior to his making the statements violated any of his rights in light of *Brown* v. *Illinois* (422 US 590). The Court of Appeals in turn remanded the issue to Monroe County Court for a hearing (38 NY2d 812). That hearing was held and the trial court suppressed the statements and the drawings holding that the defendant was illegally detained and that there was insufficient attenuation of this primary taint to render the subsequent inculpatory statements and sketches admissible.

In *Brown* v. *Illinois* the Supreme Court focused on a person's Fourth Amendment right to be free from an unlawful seizure. Closely to be scrutinized, therefore, must be the claim of the majority that a suspect has been briefly detained for questioning upon reasonable suspicion

under carefully controlled conditions ample to protect his Fifth and Sixth Amendment rights (*People* v. *Morales*, 42 NY2d 129). The majority rely upon *Morales*, but there is was found that the defendant, an "experienced" 30-year-old lawbreaker voluntarily arranged to meet the police and willingly went to the police station for questioning. The "checkerboard square" of police investigation in that case pointed directly at the defendant and nobody else and the investigation was complete except for interrogation of Morales. However, in the present case, the teen-aged Black suspect was a novice in matters of police procedure. The prosecutor conceded at the suppression hearing that there was no distinction between the pickup of this defendant and an arrest, except for the absence of the word "arrest". Most important, the trial court found, and I agree, that this defendant did not voluntarily accompany the detectives to police headquarters. This small Black youth was confronted by two very large white detectives who, according to him grabbed him and took him to the police car. The detectives are not certain whether they touched him or not.

Further, here, rather than conduct a complete investigation, the police relying upon stale rumors and triple-hearsay that was over four months old when the police learned of it, seized the defendant. Such seizure clearly was solely for investigatory purposes. Even assuming that this was a detention of the kind contemplated by *Morales*, there were avenues of investigation yet unexplored, i.e., the questioning of Hubert and "BaBa" Adams which could have been easily accomplished since at least the latter was then in prison. From all these circumstances, and unlike *Morales*, it may not be said that Dunaway was briefly detained under carefully controlled circumstances. Rather, he was illegally seized, detained or arrested and his rights should not turn upon the use of failure to use the word "arrest" where that, in fact, was his status.

In my view, the majority's reliance upon *People* v. *Morales* (*supra*) and *People* v. *De Bour* (40 NY2d 210) is misplaced. It is recognized in New York that police in an encounter in a public place have authority to de-

tain briefly and request information from citizens while discharging their law enforcement duties (*People* v. *De Bour*, *supra*). This is not such a case. The majority read *Morales* to posit a broad test of reasonable police conduct under the circumstances. Instead *Morales* sets forth a tightly drawn and carefully articulated rule limited to exceptional circumstances. In reversing the trial court's suppression order the majority extend the ambit of *Morales* beyond these established parameters and in so doing violate Dunaway's rights in light of *Brown* v. *Illinois* (422 US 590, *supra*).

Having established the primary taint of an illegal seizure, an examination of this record demonstrates that it has not been attenuated under the criteria established in *Brown* v. *Illinois* (*supra*). In order to determine whether the primary taint of the illegal seizure of the defendant has been purged, three factors in addition to the *Miranda* warnings must be considered: the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct (*Brown* v. *Illinois*, 422 US 590, 603-604, *supra*). Dunaway's confession made within two hours was in close temporal proximity to his arrest; there is not the slightest suggestion in the record of the presence of any intervening circumstances; and, finally, the arrest or detention made here, concedely without probable cause, without a warrant and under circumstances which were clearly investigatory in nature constitutes flagrant official misconduct. The facts of this case are almost on point with those in *Brown*. There the Supreme Court held that the defendant's statements were inadmissible without regard to the nature of the crime which was, as in the instant case, murder.

Accordingly, I feel constrained to dissent and vote to affirm the order which suppressed the inculpatory statements and sketches.

MARSH, P.J., and WITMER, J., concur with MOULE, J; DENMAN, J., concurs in an opinion; CARDAMONE, J., dissents and votes to affirm the order, in an opinion.

Order reversed and motion denied.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

—*v*—

IRVING JEROME DUNAWAY, RESPONDENT.

Present: MARSH, P.J., MOULE, CARDAMONE, DENMAN, WITMER, JJ.

A motion having been made on behalf of the respondent for an order amending the decision on the appeal taken herein to state that the decision was made exclusively upon the law, and for other relief.

Now, upon reading and filing the affidavit of James M. Byrnes sworn to March 20, 1978, the notice of said motion with proof of service thereof, the opposing statement of Melvin Bressler dated March 29, 1978 and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be and the same hereby is denied.

Entered: April 7, 1978

MARY F. ZOLLER, Clerk

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. MATTHEW J. JASEN,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

IRVING JEROME DUNAWAY, APPELLANT

CERTIFICATE DISMISSING APPLICATION FOR LEAVE TO APPEAL

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* the application for leave to appeal is hereby dismissed upon the ground that CPL 450(2)(a) does not provide for review of the order appealed from.
Dated at Buffalo, New York

May 10, 1978.

/s/ Matthew J. Jasen
Associate Judge

* Description of Order:

Order of Appellate Division, Fourth Department, entered March 1, 1978, reversing Monroe County Court order entered March 11, 1977, and order of Appellate Division, Fourth Department, entered April 7, 1978, denying motion for an order amending the order of March 1, 1978, to state that it was made exclusively upon the law.

DECISION COURT OF APPEALS

Jun. 13, 1978

Mo. No. 536

THE PEOPLE &C., APPELLANT

vs.

IRVING JEROME DUNAWAY, RESPONDENT

Motion, treated as one for reargument, denied.

SUPREME COURT OF THE UNITED STATES

No. 78-5066

IRVING JEROME DUNAWAY, PETITIONER

v.

NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Appeals Court of the State of New York.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 27, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 284493 268

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION
~~PETITION FOR WRIT OF CERTIORARI TO THE~~
NEW YORK STATE SUPREME COURT
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

Respondent's Memorandum in Opposition

For the purposes of this memorandum, we adopt the preliminary matters in the Petition titled: Opinions Below; Jurisdiction; Questions Presented For Review; Constitutional Provisions and Statutes Involved.

Point One

The state court decision is in conformance with prior decisions of this Court as respects the Constitutional issues; no need for further review is shown.

Petitioner Dunaway was escorted to police headquarters for questioning, where he was given his Miranda warnings. His subsequent statement and the drawing he made were introduced at trial against him. No serious issue as to his Fifth or Sixth Amendment rights is present. The central issue then, is whether the presumed initial violation of his Fourth Amendment rights requires that his statement and the drawings must be suppressed as fruits of the poisonous tree.

This case was previously before this Court, and remanded for further consideration in light of Brown v. Illinois, 422 U.S. 590 (Dunaway v. New York, 422 U.S. 1053, 95 S. Ct. 2674).

In Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, this Court developed the "fruit of the poisonous tree" doctrine and established some guidelines so trial courts could determine when to exclude evidence resulting from an illegal arrest.

In Brown, the only issue relevant to this case was whether the Miranda warnings alone would "... break the causal connection between the illegal arrest and the giving of the statements..." People v. Brown, 56 Ill. 2d 312, at 317, 307 N.E. 2d at 358.

This Court said it would not, and also said:

> The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. Brown v. Illinois, 422 U.S. at 603, 95 S. Ct. at 2261.

In this case, there was little if any coercion. The officers that initially contacted Dunaway did nothing more than transport him to headquarters. There was no talk of arrest, no guns were displayed, and those officers did not talk to Dunaway about the case at all.

When he arrived at headquarters (or shortly thereafter) Dunaway was interviewed by one officer, Detective Novitsky. Granting that talking to a detective in a police station may create its own coercive atmosphere, there is not the slightest evidence that the police sought to exploit the illegal detention. Indeed, they did not appear to think they did anything wrong. We do not suggest that their thoughts provide a defense, but the state court could consider the "... purpose and flagrancy of the official misconduct..." among other things, in determining the admissibility of the evidence. Brown v. Illinois, 422 U.S. at 603, 95 S. Ct. at 2261.

The findings of the state court after remand clearly show there was no coercion, no threats, no pressure and no improper exploitation of the initial illegality (See the trial court's findings in the Petitioner's appendix at A-17 that the Miranda warnings were given and that defendant (Petitioner) voluntarily gave the evidence).

Apparently the only illegality present here was the initial detention, which continued until Detective Novitsky read Dunaway his rights.

Under those circumstances, the court below could correctly find that the Miranda warnings alone would sufficiently attenuate the unlawful detention so as to make the admission the product of a free will.

The flagrant conduct found in Brown is not present in this case. Since we understand Brown to require that the facts offered to weaken the effect of the initial illegality must be measured in terms of the flagrancy involved, the minimal illegality here easily supports the conclusion that, in this case, the Miranda warnings themselves sufficiently attenuated the initial illegality, making the statement and the drawing admissible.

This is true even in face of the instruction in Brown that:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. (422 U.S. at 402, 95 S. Ct. at 2261)

because the violation here was neither wanton nor purposeful.

The state court holding here is not only consistent with the holding in Brown, but also the holdings in United States v. Calandra, 414 U.S. at 348, 94 S. Ct. at 620: "... the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons..." See also, Michigan v. Tucker,

417 U.S. 433 at 447, 94 S. Ct. at 2365, where the Court discusses the effect of the officer's good faith.

We therefore urge that the state appellate court here has decided the federal question consistent with the applicable decisions of this Court [c.f. Rules of the Supreme Court of the United States, Rule 19 - 1 (a)], and further review is not necessary.

Point Two

A second, purely voluntary, statement by petitioner supports the holding that his earlier statement was the product of his free will.

There are additional facts present in the case which support the Constitutionality of conviction which the state courts did not rely on.

The day after petitioner Dunaway made his initial statement, and provided the drawings to Detective Novitsky, Dunaway asked the jail guard if he could see Novitsky. He initiated this contact wholly on his own.

When they met, Dunaway gave a more complete statement to Novitsky, including the part played by the codefendant in this robbery-murder.

Both statements and the drawings were held admissible at the pre-trial suppression hearing.

At the joint trial, the trial prosecutor elected not to use that second statement because of redaction problems. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 162.

This, we think, lends great weight to the holding that Dunaway's initial statement was freely given and not the result of the initial, illegal detention.

The second statement was voluntary in the purest sense, since he made it without prompting from anyone. It is also not a "cat out of the bag" statement, made only because the police already knew everything.

That theory might be applicable if the police had coaxed the second statement from him, which they did not do.

These additional facts were presented to the court below, but they made their decision without reference to that aspect of our argument, presumably because they felt it unnecessary.

Nevertheless, in considering whether the state court decision was consistent with Constitutional requirements, this Court can consider the entire factual history of the case in determining if petitioner's initial statement was made freely, or was the product of an illegal detention.

Summary and Conclusion

In Points One and Two we have attempted to persuade the Court that further review is not necessary because the decision below is consistent with the recent decisions of this Court on the relevant issues.

However, the state court decision was clearly not decided solely on the grounds we have urged here.

The state court (Appellate Division of the Supreme Court) majority, and the concurring justice decided the case on the theory that the initial detention was not unreasonable, and therefore there was no reason, on Fourth Amendment grounds, to suppress the statement and the drawing.

Their decision was based, almost entirely, on the decision by the state's highest court in People v. Morales, 42 NY2d 129, cert. den., 434 US 1018, 98 S. Ct. 739.

The Morales case had a long history; the New York Court of Appeals had originally affirmed Morales' conviction for murder in 22 NY2d 55; this Court remanded for a further hearing (Morales v. New York, 396 US 102) and after the hearing, and an intermediate appeal, the Court of Appeals affirmed, as noted above.

In their decision, the Court of Appeals held that:

> "...a suspect may be detained upon reasonable suspicion for a reasonable and brief period of time for questioning under carefully controlled conditions protecting his Fifth and Sixth Amendment rights..." 22 NY2d at 64

They reaffirmed that holding when the case came to them the second time (42 NY2d at 137; "...our original view...remains valid today...").

Based on that, the appellate division majority in this case concluded (one justice dissenting) that "...the police conduct here is proper under Morales..." People v. Dunaway, 61 AD2d at 303. The three judge majority also concluded that there was sufficient attenuation to render the questioned evidence admissible, based on Brown v. Illinois, 422 US 590, as we have argued here (61 AD2d at 303).

The concurring justice agreed only with the Morales grounds for admissibility, and specifically disagreed with the Brown theory. 61 AD2d at 304, Denman, J., concurring opinion.

It seems clear that the New York state courts are sensitive to the problems in Brown, and have neither avoided those issues nor ruled contrary to this Court's decisions in that area. See, e.g. People v. Morales, 42 NY2d 129 at 134-36; People v. Martinez, 37 NY2d 662 at 670; People v. Kocik, 63 AD2d 230 (Fourth Dept., 1978, adv. sh. 36); People v. Burley, 60 AD2d 973, 974 (Fourth Dept., 1978, adv. sh. 16).

We urge therefore, that because this case was decided in conformity with this Court's decisions, and because the New York courts have consistently protected defendant's Fourth Amendment rights, there is no need to accept this case for review.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,
Petitioner

v.

STATE OF NEW YORK,
Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

Brief For Petitioner

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INDEX

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OPINIONS BELOW

Defendant's judgment of conviction was entered on April 12, 1972. That judgment of conviction was affirmed by the Appellate Division, Fourth Department (42 A.D.2d 689 (1973)), and the Court of Appeals (35 N.Y.2d 741 (1974)). This Honorable Court granted the defendant's petition for certiorari, vacated the judgment and remanded the case to the New York State Court of Appeals for further consideration in light of *Brown* v. *Illinois*, 442 U.S. 590 (1975) (*Dunaway* v. *New York*, 422 U.S. 1053 (1975)).

After reargument, the New York State Court of Appeals affirmed the judgment of conviction, yet re-

manded the case to the Monroe County Court for a factual hearing and for such other proceedings as were necessary to decide the issues presented (38 N.Y.2d 812 (1975)). After the hearing in Monroe County Court, a decision was rendered by the Honorable Donald J. Mark, Monroe County Court Judge, which is not reported (A-116 thru A-122). The Appellate Division, Fourth Department reversed Judge Mark's decision and order (61 A.D.2d 299 (1978)) and the New York State Court of Appeals dismissd defendant's application for permission to appeal (A-134).

JURISDICTION

The petitioner's conviction was affirmed by the Court of Appeals of New York State, except for the suppression issue, on December 29, 1975. The judgment of conviction became final in all respects when the Court of Appeals dismissed petitioner's application for leave to appeal to the Court of Appeals from the order of the Appellate Division, Fourth Department, reversing the Monroe County Court's suppression order. The petitioner's application for leave to appeal to the Court of Appeals was dismissed on May 10, 1978. Petitioner's motion for reargument on the judgment of conviction was denied on June 13, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Was Petitioner arrested without probable cause and, if so, did the prosecution sustain its burden of

showing that the taint of the initial illegality was dissipated in view of the factors enunciated by this Court in *Brown* v. *Illinois,* 422 U.S. 590 (1975) so as to allow the trial court to receive Petitioner's confession and sketches into evidence.

2. If Petitioner was not arrested, then was the admission into evidence of Petitioner's confessions and sketches, given shortly after being taken to the police station, in violation of his rights under the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, upon the ground that the confessions and sketches were the product of an unlawful seizure and detention of Petitioner for purposes of interrogation.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The petitioner, Irving Jerome Dunaway, was charged by indictment, along with his co-defendant, Thomas James Mosley, with the crimes of Felony Murder and Attempt to Commit the Crime of Robbery in the First Degree. The charges arise out of an incident where, during the course of an attempted robbery of a pizza parlor by two males, one of the men (not the Petitioner) shot and killed the proprietor. The Petitioner and his co-defendant Mosley were tried

jointly. A jury found the Petitioner guilty on both counts. On April 13, 1972 he was sentenced by the Honorable George D. Ogden, Monroe County Court Judge, to an indeterminate sentence of imprisonment having a maximum term of life and a minimum of twenty-five years for Felony Murder and an indeterminate term having a maximum of fifteen years for attempted Robbery, both sentences to run concurrently.

Prior to trial, a motion was made to suppress statements and sketches obtained by police as a result of the Petitioner's illegal detention. A hearing was held and the trial court determined that both the statements and sketches were admissible. That judgment of conviction presently stands affirmed.

On August 3 and 4, 1976 a second suppression hearing was held by the Monroe County Court at the direction of the New York State Court of Appeals (38 N.Y.2d 812). Three police officers, Anthony L. Fantigrossi, Gerard Luciano, and Robert C. Mickelson, testified as witnesses for the prosecution. The facts developed at the hearing were as follows:

In August, 1971 Anthony L. Fantigrossi, who at that time was Detective Lieutenant on the Rochester Police Department, and in charge of the Physical Crimes Squad, was involved in the investigation of a homicide. The homicide had occurred during the course of an attempted robbery on March 26, 1971 at the Tower of Pizza, located on Genesee Street, Roch-

ester, New York. At 8:30 P.M. on August 10, 1971, Detective Fantigrossi received a call at his home from Detective Robert C. Mickelson (A-51). Mickelson told Fantigrossi that an informant, one O.C. Sparrow, had received information that one James Cole was a participant in the Tower of Pizza homicide. Fantigrossi went to the Public Safety Building and interrogated Sparrow (A-51). He had never met Sparrow before (A-55). It appears that Cole had told Sparrow that he (Cole) committed the crime along with someone named Irving. Cole was in custody at that time on an unrelated charge so Fantigrossi and Mickelson went to the Monroe County Jail and questioned him (A-52). After two hours of questioning, Cole told the detectives that he had no part in the crime (A-52). Cole told the detectives that one Hubert Adams, an individual with whom he had been incarcerated at the Monroe County Jail, had stated to Cole that Hubert Adams' brother, also known as "BaBa" Adams, had committed the crime (A-52-53; 56). In addition, Hubert Adams had told Cole that an individual named Irving was also involved in the crime. It is significant to note that the conversation between Adams and Cole took place approximately two months before Cole was questioned by Fantigrossi and Mickelson (A-52, 56). On August 10, 1971, the day Cole was questioned by the detectives, Hubert Adams was incarcerated at the Elmira Correctional Facility (A-56). There is nothing in the record to indicate how Hubert Adams obtained the information or that Cole knew how the information came into Adams' possession. Further, there is

nothing in this record which indicates that either Sparrow or Cole had ever provided reliable information to the police in the past.

Fantigrossi then issued the order to pick the petitioner up and bring him in (A-54; 92). The order was given to two teams of detectives, one composed of Mickelson and Ruvio (A-53). Fantigrossi wanted the petitioner brought in so that the police could interrogate him regarding the homicide (A-57-58). Mickelson and Ruvio were already involved in the investigation of the case and "knew as much about the case as (Fantigrossi) did." (A-58). Fantigrossi admitted that, when he gave the order, he *knew* he did not have enough information to obtain an arrest warrant (emphasis supplied) (A-60).

The following morning at approximately 8:00 A.M., Detective Gerard Luciano drove Detectives Mickelson and Ruvio to the petitioner's home on Broad Street (A-69). Mickelson and Ruvio had been to the Dunaway residence several times throughout the preceding night, looking for the petitioner (A-91). The remainder of the night they spent searching the west side of Rochester (A-92-93).

After arriving at the Dunaway residence, Mickelson and Ruvio were met by the petitioner's mother at the door. Both the detectives entered the home and searched throughout the house for the petitioner (A-93-94). Mrs. Dunaway was told that the police were conducting an investigation and they were looking for her son.

Meanwhile, Detective Luciano remained outside in the driveway in a position where he could observe anyone attempting to escape out the side door or window (A-27-73). Before Mickelson came out of the house, Luciano observed a young girl exit from the side door, walk down Broad Street, turn the corner onto Walnut Street and enter the third house from the corner (A-73). Mickelson then came out of the Dunaway home and he and Luciano walked to the house on Walnut Street. Mickelson went to the door while Luciano once again positioned himself in the driveway (A-75). The petitioner came to the door and Mickelson said "Axlerod Dunaway." (A-69). The petitioner was then taken by the two detectives to the unmarked police car and transported to the Public Safety Building where he was turned over to Officer Novitskey for interrogation.

It should be kept in mind that the detectives were in plain clothes and drove an unmarked vehicle. Detective Mickelson was approximately 6'3" tall and weighed 203 pounds. Luciano was taller than Mickelson (A-109). Irving Dunaway was 18 years old, weighed approximately 130 pounds and was about 5'7" tall. He had gone as far as the tenth grade in school.

Mickelson denied ever having physical contact with the petitioner but neither he nor Luciano could remember whether Luciano physcially grabbed the petitioner at any time (A-67; 98; 99; 102). Ruvio and Luciano rode in the front seat and Mickelson was

seated in the back seat with the petitioner on their way to the Public Safety Building. In spite of the fact that the petitioner questioned the detectives as to the reason for his being taken downtown, none of the detectives told him that he was a suspect and at no time prior to his arrival at the Public Safety Building was he advised of his rights (A-6-7; 81-82). He was merely told that they would talk about it when they arrived at their destination. It is important to note that at no time did the police ever inform the defendant of his right not to go downtown with them.

At the time of his arrest and detention on August 11, 1971, this defendant was only eighteen years old (A-31). The defendant testified that at approximately eight o'clock in the morning on August 11, 1971, his sister came to a friend's house where he was staying to inform him that the police were at their house looking for him (A-32). As Mr. Dunaway began to leave his friend's house, a detective came up to the steps of the house and as he was walking down the steps that detective grabbed him by the arm and called for another detective who was nearby (A-32). The second detective grabbed him by the belt of the pants and they began walking toward Broad Street (A-32). The detectives then put the youth in the police car and they drove downtown (A-32-33). Irving testified that he asked the police why they were taking him downtown and the police detectives did not respond (A-33). The defendant also testified that he was not advised of his rights until just before the steno-

graphic statement was taken, which was about one hour after the interrogation began (A-35). It is significant to note that this was the first time in his life that the defendant was ever questioned by the police or placed in an interrogation room (A-37).

Shortly after their arrival at the Public Safety Building, the defendant made an incriminating statement (A-8-8; 10-11) and drew two incriminating sketches (A-12-13).

Detective Novitskey also testified that he advised the defendant of his *Miranda* rights prior to any questioning (A-6-7); however, the defendant's signature did not appear on the waiver of rights card (A-15). It should be noted that at no time was the defendant ever advised by Detective Novitskey that the sketches he made could be used against him in a court of law (T.M.297[1]).

At the close of the People's proof, the District Attorney stipulated that the defendant was in the physical custody of the detectives from the time he left the Walnut Street address with the two detectives until they arrived at headquarters and if he had attempted to leave he would have been physically restrained and handcuffed (A-109-110).

[1] T.M. refers to the page in the Trial Minutes at which the factual information indicated can be found since those minutes are not part of the appendix filed with this court.

SUMMARY OF ARGUMENT

The petitioner was arrested by the Rochester Police Department on August 11, 1971 and taken to the police headquarters for purposes of investigation and/or interrogation. Clearly, the arrest was not based on probable cause, and the lower courts have so held. Shortly after his arrest, petitioner made a confession and sketches which were admitted into evidence against him at trial. Later that same day petitioner made a second oral statement which was stenographically recorded the next day. However, that second statement was not admitted into evidence at his trial. Both the confessions and the sketches were obtained as the result of petitioner's illegal arrest and the respondent failed to sustain their burden of establishing that the taint of that illegal arrest had been dissipated by intervening factors. Therefore, the confessions and sketches should have been excluded from evidence under this Court's holdings in *Brown* v. *Illinois,* 422 U.S. 590 (1975) and *Wong Sun* v. *United States,* 371 U.S. 471 (1963). Secondly, if this Court should choose to apply the "reasonableness standard" developed in *Terry* v. *Ohio,* 392 U.S. 1 (1968), the confessions and sketches were still inadmissible since the police conduct of "seizing," "detaining" *and* "interrogating" petitioner was *not* reasonable in view of the factors involved in this case, as well as, the information possessed by the police.

POINT I: The Petitioner Was Arrested Without Probable Cause And, Since The Taint Of That Illegal Arrest Was Not Proven By The Prosecution To Have Been Dissipated, The Confession Obtained By The Police Shortly After Petitioner's Arrest Was Erroneously Admitted Into Evidence At His Trial Since It Was Obtained In Violation Of Petitioner's Constitutional Rights Under The Fourth And Fourteenth Amendments.

This case was originally remanded to the New York State Court of Appeals for Reconsideration in light of *Brown* v. *Illinois*, 422 U.S. 590 (1975). See, *Dunaway* v. *New York*, 422 U.S. 1053 (1975). It is, therefore, appropriate to analyze the issue presented in terms of (a) the petitioner's arrest by the Rochester Police Department; (b) if there was an arrest, did the police have probable cause for the arrest and subsequent detention; and, (c) if there was an arrest without probable cause, then was the taint of that illegal arrest purged by any of the factors enunciated by this Court in *Brown* v. *Illinois*, supra at 604,-605.

A: The Petitioner's Detention

Irving Dunaway was taken into physical custody by detectives from the Rochester Police Department shortly after 8:00 A.M. on August 11, 1971 (A-89; 91). The police detectives were instructed by their superior to "pick him up and bring him in" (A-54). They receive this same instruction when they have a warrant of arrest for a particular person (A-108).

As Detective Fantigrossi clarified on cross-examination (A-61):

> Q. You told them to arrest him?
>
> A. If you are talking about taking away the freedom of movement, if that is the word, yes, then it is arrest.

The arresting officers went to the petitioner's home looking for him and it is clearly established on this record that they were going to bring him downtown even if they had to use physical force to do so (A-109). The petitioner was taken from a private dwelling to police headquarters. Detective Mickelson went so far as to admit that this petitioner was "informally" under arrest (A-106). However, excessive physical force was not required to be used since the petitioner succumbed to the police authority (A-33), according to petitioner, after being grabbed by the belt (A-32). After all, the record indicated that Detective Mickelson is six feet three inches tall and weighed two hundred and five pounds and Detective Luciano was even larger than Mickelson (A-109). Obviously, this defendant, who stands five feet seven inches tall and weighed 130 pounds, was not in any position to resist the officers' intention of taking him downtown.

Petitioner was placed in a police car (A-33) with two detectives seated in the front seat and a third detective seated in the back with petitioner (A-33).

It is significant to note that the police never advised Dunaway that he had the right not to go with

them, if he so desired (A-81). It is even more significant that the police refused to tell the petitioner why he was being taken downtown despite his repeated inquiries (A-81; 100). There can be no question that the illegal detention here was for the purpose of questioning the petitioner "incommunicado" in hope of turning up evidence (A-54; 56-57; 99).

In view of these facts it is not suprising that the hearing court found that "this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police (citation omitted), or where the defendant was merely escorted to police headquarters by the police (citation omitted)" (A-117). In fact, the Court went on to hold that "the factual predicate in this case did not amount to probable cause sufficient to support *the arrest* of the defendant" (A-121, emphasis supplied). The Appellate Division did not reject this finding. Rather, the court ruled that despite the lack of probable cause, the police were permitted *to detain* the petitioner because their information amounted to "reasonable suspicion" (A-125-126).

The lower court's determination that petitioner was arrested is justified by the record and should not be disturbed by this Court. *Watts* v. *Indiana*, 338 U.S. 49, 51-52 (1949); *Beck* v. *Ohio*, 379 U.S. 89, 100, [Harlan, J., dissenting] (1964).

"To constitute an arrest, there must be an actual or constructive seizure or detention of the person,

performed with the intention to effect an arrest and so understood by the person detained." *Hicks* v. *United States*, 382 F2d 158, 161 (D.C. Cir. 1967) quoting, *Jenkins* v. *United States*, 161 F2d 99, 101 (10th Cir. 1947); accord, *United States* v. *Jones*, 352 F.Supp. 369, 377 (S.D. Georgia 1972) affd., 481 F2d 1402 (5th Cir. 1973); *Fisher* v. *United States*, 324 F2d 775 (8th Cir. 1963), cert, denied, 337 U.S. 999 (1964).

As the court in *United States* v. *Jones*, *supra*, at 378 appropriately noted:

> It [arrest] is not when the officer formally proclaims a person to be in custody but when one is effectively restrained and is cognizant thereof that matters. *United States* v. *Washington*, D.C., 249 F. Supp. 40, affirmed 130 U.S. App. D.C. 374, 401 F2d 915. See also *United States* v. *Davis*, D.C., 328 F. Supp. 350, 352 and *United States* v. *Birdsong*, 446 F2d 325, 328 (5th Cir.). . . .If there is significant interference with a defendant's liberty, the fact that the police did not intend to make a formal arrest or did not think that their actions constituted an arrest is irrelevant to compliance with Fourth Amendment standards. *United States* v. *Stafford*, D.C., 303 F. Supp. 785, 788.

It has also been said that,

> To effect an arrest there must be actual or constructive seizure or detention of the person arrested, *or his voluntary submission to custody* and the restraint must be under real or pretended legal authority. . . .If the person arrested under-

> stands that he is in the power of the one arresting and submits in consequence, it is not necessary that there be an application of actual force, a manual touching of the body, or a physical restraint that may be visible to the eye. *United States* v. *Lampkin*, 464 F2d 1093, 1095 (3rd Cir. 1972) quoting 5 Am. Jur. 2d 695-696, emphasis added; Accord, *Commonwealth* v. *Farley*, 364 A.2d 299 (Sup.Ct. Pa 1976).

As the Pennsylvania Supreme Court stated, "...an arrest may be effectuated without the actual use of force and without a formal statement to the detainee that he is being arrested (citations omitted). Moreover, an arrest cannot be disguished by the use of such terms a 'investigatory detention'. *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Commonwealth* v. *Fogan*, 296 A.2d 775, 758 (1972)." *Commonwealth* v. *Farley, supra*, at 302.

The record in this case clearly establishes the fact, as determined by the lower court, that this petitioner was arrested. The police were under orders to "pick him up and bring him in" and this was the same order they were given to arrest someone based on a warrant (A-54; 108). Yet, in this case they went to petitioner's house without a warrant (A-108). The police clearly indicated that the defendant was not free to go either at the inception of this confrontation or upon their arrival downtown at police headquarters (A-73; 96). This fact is further supported by the stipulation of the prosecutor that the defendant was in the detectives physical custody and had he attempted to leave,

he would have been physically restrained (A-109, 110). The petitioner submitted to police authority and did not attempt to resist their arrest (A-32-33). Clearly, he knew he was in their control and custody as evidenced by his inquiries of why he "had to go" downtown.

As Detective Luciano testified (A-81):

> A: He [the Petitioner] said well, I think if I remember, he said why do we have to go downtown and talk. We [the detectives] said we would discuss that in full when we got downtown.
>
> Q. Your testimony is he asked why he had to go downtown and talk?
>
> A. Yes, sir.

The arrest in this case closely parallels that of the petitioner in *Davis* v. *Mississippi*, 394 U.S. 721 (1969). In both cases the petitioners were taken to police headquarters and there was more than a "significant interference with the defendants' liberty." Petitioner's case is more serious than Davis' in that Davis was detained merely for fingerprinting which "involve[d] none of the probing into an individual's private life and thoughts which marks an interrogation...." See, *Davis* v. *Mississippi, supra*, at 727.

Clearly, the confrontation between the petitioner and the Rochester Police Department constituted, as

found by the hearing court, an arrest. *Davis* v. *Mississippi, supra; Brown* v. *Illinois, supra; United States* v. *Lampkin, supra; Commonwealth* v. *Farley, supra; United States* v. *Jones, supra.*

B: Was There Probable Cause For Petitioner's Arrest?

This Court has consistently held and it has become axiomatic in our system of jurisprudence that under the Fourth Amendment "The standard for arrest is probable cause." *Gerstein* v. *Pugh,* 420 U.S. 103, 111 (1974). See also, *Beck* v. *Ohio, supra; Henry* v. *United States,* 361 U.S. 98 (1959); *Brown* v. *Illinois, supra; Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949); *Terry* v. *Ohio,* 392 U.S. 1, 20-22 (1968). The protections provided by the Fourth Amendment have been held to be applicable to the States through the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

What information did the Rochester Police have to arrest the petitioner on August 11, 1971, for investigatory purposes in connection with the Tower of Pizza murder which occurred on March 26, 1971?

The police had received information from an informer (O.C. Sparrow) that James Cole and a guy by the name of Irving were involved in the murder (A-51). Not only was Sparrow's reliability never established, but the detectives had never met him before (A-55). Apparently, the basis for Sparrow's information was

a conversation he had with Cole. The police then proceeded to question Cole, who was in custody at that time. Cole denied any involvement in the crime and after two hours of questioning (A-52) told the police that he heard from Hubert Adams that Hubert's brother, "BaBa," and another guy named Irving were involved in the crime. At no time did the police or the prosecutor ever attempt to establish the reliability of this second, "disclaiming" informer. The information Cole related to the police was at least two months old. Based on this multiple hearsay information from an unreliable informer, Detective Fantigrossi ordered Mickelson and others "to pick up" the petitioner and "bring him in" (A-54).

It appears obvious to this writer that the information the police had did not amount to "probable cause." In fact, both the hearing court and the Appellate Division held that "this hearsay information did not constitute probable cause to arrest defendant" (See, *People* v. *Dunaway,* 61 A.D.2d 299, 302).

The information the police had in this case was far less than the authorities had *Aguilar* v. *Texas,* 378 U.S. 108 (1964), *Spinelli* v. *United States,* 393 U.S. 410 (1969) and *Wong Sun* v. *United States,* 371 U.S. 471 (1963). The information provided by the first informer (Sparrow) was later proven to be unreliable when the second informer (Cole) denied any involvement in the murder. Further, the police admitted they had never even met Sparrow prior to obtaining the information from him.

The information Cole provided to the police was an attempt to shift the focus of the police investigation from himself to another person. It is important to note that Cole's information was obtained more than two months prior to the questioning by Fantigrossi, which took place more than four and one-half months after the murder. It, therefore, was correctly found by the hearing court to have been "stale." See, *Sgro* v. *United States*, 287 U.S. 206 (1932).

Since the hearing court (A-121; 125-126) and the Appellate Division have found that the police lacked information that would rise to the level of probable cause, petitioner respectfully submits that the police clearly lacked facts which would support a finding of probable cause sufficient to justify the arrest of petitioner and that finding is amply justified by the facts established in the record.

C: Was The Taint Of The Illegal Arrest Purged By Any Of The Intervening Factors Enunciated By This Court In Brown v. Illinois, 442 U.S. 590 (1975)

As previously indicated, this Court remanded petitioner's case to the New York Court of Appeals for "further consideration in light of *Brown* v. *Illinois*," *supra*. In *Brown*, this Court examined and explained its earlier holding in *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

This Court stated, "The question of whether a confession is the product of a free will . . . must be

answered on the facts of each case." *Brown* v. *Illinois*, *supra*, at 603.

It is important to note that "the voluntariness of the statement is a threshold requirement" *Brown* v. *Illinois*, *supra*, at 604. Petitioner respectfully submits that the Miranda warnings are an important factor in that respect. Clearly, if the statement obtained was not voluntary then it would not be admissible in view of the protections provided by the Fifth Amendment (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)) and this Court would not have been compelled to reach the Fourth Amendment question posed in *Brown*.

In determining whether a confession is the "fruit" of an illegal arrest and, therefore, should be excluded, this Court clearly declined to adopt either a "per se" or "but for" rule. Rather, this Court held that the following factors were relevant in determining whether a confession is the product of a free will: "[1] The proximity of the arrest and confession (footnote and citations thereunder omitted), [2] the presence of intervening circumstances (citation omitted), and, particularly, [3] the purpose and flagrancy of the official misconduct (footnote and citations thereunder omitted)."

It is interesting to note that the Appellate Division found (by a 3 to 2 vote) sufficient factors which attenuated the primary taint while the hearing court found that "there was no claim or showing by the [Respondent] of any attenuation of the defendant's illegal detention" (A-121).

detention were in fact still available to Detective Fantigrossi when he decided to have Dunaway "grabbed" for interrogation.

Second, in attempting to distinguish Brown, the New York Court of Appeals characterized the seizure in Brown as an arrest "without a scintilla of evidence casting suspicion upon [the defendant]." People v. Morales, supra at 136-37. However, in this Court's only comment on the adequacy of the evidence underlying the seizure challenged in Brown, concurring Justices Powell and Rehnquist assessed the evidence accumulated by the arresting officers as sufficient to require a remand to determine whether the officers reasonably believed they had probable cause. 422 U.S. at 613. In other words, the only members of this Court to address the question clearly thought that the seizure in Brown was based on at least some articulable suspicion. 2/ Thus, the New

2/ In Brown, Justices Powell and Rehnquist argued that supression was inappropriate if the arresting officers acted in good faith; therefore, they analyzed the evidence and determined that good faith was a question of fact for remand. The majority, adhering to the traditional view that illegally

(FN 2 continued on next page)

York courts have misread Brown, and have relied upon a distinction between Brown and this case which does not exist.

Third, as this Court held recently in Mincey v. Arizona, supra, the nature or gravity of the offense being investigated is simply irrelevant to determining the scope of Fourth Amendment protections. 57 L.Ed.2d at 300. See also Michigan v. Tyler, supra; Coolidge v. New Hampshire, supra.

Finally, characterizing this detention as "brief" is inaccurate and misleading. As in Brown, the detention here was not "brief" within the meaning of Terry v. Ohio, supra. Petitioner was not stopped for a few minutes on a street corner and then allowed to proceed. Instead, he was forcibly taken to a police station, and deprived of his liberty of movement for hours. The existence or non-existence of formal "arrest" records is an irrelevant question of state law, and New York cannot

obtained evidence must be suppressed regardless of the arresting officer's subjective good faith, did not have to reach this question once it decided that the seizure of Brown was effected on less than probable cause.

legalize an unconstitutional seizure by not recording it.

No matter how New York characterizes this detention, it in fact epitomizes precisely the type of "seizure" of the person that the Fourth Amendment's probable cause requirement was designed to regulate. This Court's prior rulings make clear that for constitutional purposes a "seizure"--whether an "arrest" or "investigatory detention" under state law--occurs whenever police take a suspect into custody, whether they charge him with a crime or not. See Terry v. Ohio, supra, at 16, 19; Sibron v. New York, 392 U.S. 40, 66-67 (1968); Davis v. Mississippi, supra, at 726-27 (1969); Draper v. United States, 358 U.S. 307, 311 (1959). See also cases cited at fn. 4, infra. In Davis, for example, a custodial detention was labelled "investigatory" by the police to avoid the probable cause requirement. But this Court rejected that characterization and equated the detention with a full-fledged arrest. In Brown, the Court treated an investigatory detention, which included removal to a police station, as a full scale arrest. In both cases, nominally "investigatory"

detention was held unconstitutional absent probable cause. As in all Fourth Amendment cases, the relevant inquiry here is into the degree of intrusion into personal liberty that the challenged practice involved and into the adequacy of the factual basis put forward to justify it. The inquiry does not end just because the practice has been given an inoffensive name, or because state law enforcement interests weigh heavily in the balance. See Argument I.C, below.

In addition, it would be anomalous to hold under the Fourth Amendment that a custodial detention for questioning does not rise to the level of "seizure" requiring probable cause when it is sufficiently "custodial" to invoke the full protections of the Fifth and Sixth Amendments. See Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964); Miranda v. Arizona, 384 U.S. 436, 444, 477-78 (1966). Compare Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (Miranda warnings necessary when suspect "is no longer free to go where he pleases"). Although under certain circumstances Fifth and Sixth Amendment rights might be triggered in the absence of Fourth Amendment rights, it is hard to imagine a

situation where an investigation is focused to a point that warrants custodial interrogation at a police station after Miranda warnings that does not also warrant full Fourth Amendment protections. Dunaway's full Fourth, Fifth, and Sixth Amendment rights should have been triggered at the same time.

B. The Fourth Amendment Permits "Stops" For Questioning Based On Less Than Probable Cause, But Prohibits More Intrusive Detentions Without Probable Cause.

Central to the decision of the New York court in this case was the view that custodial detention at a police station for questioning is somehow different from an "arrest," and therefore justifiable on the lesser standard of "reasonable suspicion." However, this Court's decisions regarding forcible police detentions for investigative purposes make clear that such an analysis is wrong. A forcible custodial detention for investigative purposes which includes transportation to a police station for questioning is illegal absent probable cause and a warrant.

In the ordinary police investigation of an unsolved crime, interviewing witnesses and potential suspects is, of course, an effective, and often indispensable police procedure. See the extensive discussion in Culombe v. Connecticut, 367 U.S. 568 (1961). The Court has stated several times that an officer is not required to avoid street encounters made for the purpose of investigating suspicious persons or seeking out witnesses. In Terry the Court said that it would be "poor police work indeed" to avoid such contact in suspicious circumstances. 392 U.S. at 23. See also Adams v. Williams, 407 U.S. 143, 145-46 (1971) Terry v. Ohio, supra, at 13-16, 19 fn. 16, 22, 30, 34 (1968); Sibron v. New York, supra, at 63; Miranda v. Arizona, supra, at 477-78; Palmer v. Euclid, 402 U.S. 544, 546 (1971).

However, although the Court held in Terry, supra, at 19, fn. 16, that ". . . not all personal intercourse between policemen and citizens involves 'seizures of persons,'" it also held that when police "intercourse" for the purpose of investigation or otherwise does become a "seizure" it is governed by the Fourth Amendment.

The Court expressly refrained in Terry, as it did subsequently in Morales v. New York, supra, at 105, and Davis v. Mississippi, supra, at 728, from deciding, ". . .the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation," Terry v. Ohio, supra, at 19, fn. 16. But under any reasonable reading of the Fourth Amendment case law, petitioner's detention constituted what has always been recognized as a full-fledged arrest. Examining the three instances in which this Court has permitted the seizure of a person on less than probable cause only confirms this conclusion.

Terry was the Court's first departure from the rule that probable cause must justify all police seizures. The Court stressed the narrowness of the exception by reaffirming prior Fourth Amendment rulings. It emphasized that "specific reasonable inferences" are required for stops, Id. at 27. And it limited the permissible scope of the "frisk. . .to that which is necessary for the discovery of weapons which might be used to harm the officer. . . ." Id. at 26. See also

Sibron v. New York, supra, and Adams v. Williams, supra.

The second departure from the rule commanding that probable cause justify all police "seizures" arose in the context of brief interrogation stops of suspicious automobiles near United States borders. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The Court ruled that a "reasonable suspicion" not amounting to probable cause was required to justify a stop for brief questioning. United States v. Brignoni-Ponce, supra, at 880-82.

The third and final exception to the probable cause requirement for seizures of the person concerns a traffic officer's request that a driver exit his vehicle upon being stopped for a minor traffic violation. Pennsylvania v. Mimms, ___ U.S. ___, 54 L.Ed.2d 331 (1977). Again, the Court emphasized the safety of the officer, as compared to the de minimis added intrusion of the requirement to exit the vehicle once the driver has been legitimately stopped. Requiring a driver to exit a car was characterized by the Court as only "a petty indignity." Id. at ___, 54 L.Ed.2d at 337, quoting Terry v. Ohio, supra, at 17.

The Court did not justify these exceptions to the probable cause requirement merely by saying that they were all short or that they were all minimally intrusive. And the fact that Dunaway was taken by force to the police station is not the only difference between his seizure and the momentary stops the Court has authorized. The stops the Court has permitted all had another feature in common which Dunaway's seizure does not share. All of them involved the Court's attempt to fashion flexible and realistic responses for police officers to use in coping with rapidly evolving situations beyond their control. None of them involved a chief detective sitting at his desk and leisurely deciding which suspects to haul in. The Court has authorized departures from the strict requirement of probable cause to foster good police work, not bad. Justice White's concurring opinion in Terry v. Ohio, supra, illustrates the point by highlighting the limits on the responses available to the officer for dealing with unanticipated on-the-street confrontations:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. Id. at 24-25 (White, J., concurring).

Planned police activities, or more intrusive police actions, would each be proscribed under Terry. Dunaway's detention was both planned and more intrusive.

Taken together, the Court's exceptions to the probable cause requirement define the constitutional rule: anything more than a brief on-the-spot restraint is plainly an "arrest" for constitutional purposes, and it requires probable cause, whether the detaining officer intends to prefer formal charges or merely to

"investigate". Considered together, the exceptions only confirm that Dunaway's case is within the traditional constitutional rule.

C. The New York Standard For Investigatory Detention Is Based On Irrelevant Factors And Will Confuse Fourth Amendment Jurisprudence.

New York seeks to circumvent the clear command of the Fourth Amendment probable cause requirement by labelling the forcible custodial detention of petitioner as something other than an arrest. As in Mincey v. Arizona, supra, and Coolidge v. New Hampshire, supra, New York claims that its interests in efficient law enforcement outweigh the values of personal privacy and security that the Fourth Amendment was designed to safeguard. But the framers of the Fourth Amendment have already struck a balance between state and personal interests. Brinegar v. United States, 338 U.S. 160, 176 (1949). The probable cause requirement, as interpreted and applied by judges for over two hundred years in thousands of different factual situations, provides

a reliable standard for determining the intensity of factual inferences of guilt necessary to justify the seizure of a person.[3/] There is no reason to abandon it now.

A "seizure" within the meaning of the Fourth Amendment is the deprivation of liberty which precedes the initiation of formal criminal proceedings. Formal "arrest" and the creation of permanent police records are less onerous, added intrusions, which are defined by varying provisions of state law. But the initial seizure itself is the most intrusive act in the apprehension process.

That the Fourth Amendment does not prohibit all seizures is beyond dispute; it prohibits only "unreasonable" seizures. But also beyond dispute is the rule that police functions must be accomodated to the primary and overriding interest of the Fourth Amendment--to protect the citizenry from improper "searches and seizures" :

3/ See cases cited in footnote 4, infra.

"[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' " Davis v. Mississippi, supra at 726-727 (footnote omitted)4/

4/ Some of the major cases which define and support the proposition that the Fourth Amendment requires probable cause to protect citizens from wrongful seizure are as follows: Gerstein v. Pugh, 420 U.S. 103, 112 (1975); Cupp v. Murphy, 412 U.S. 291, 294 (1973); United States v. Dionisio, 410 U.S. 1, 10-11 (1973); Papachristou v. Jacksonville, 405 U.S. 156, 169 (1972); Davis v. Mississippi, 394, U.S. 721, 726-727 (1969); Terry v. Ohio 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968); McCray v. Illinois, 386 U.S. 300 (1967); Beck v. Ohio, 379 U.S. 89, 91 (1964); Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Rios v. United States, 364 U.S. 263 (1960); (footnote continued on next page)

None of the justifications set forth by New York for a relaxed investigative detention rule relates to the fundamental need to protect the innocent from seizure. None of these justifications lessens the severity of this highly intrusive seizure. Instead, most of New York's justifications are merely self-serving

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Henry v. United States, 361 U.S. 98, 100-104 (1959); Draper v. United States, 358 U.S. 307 (1959); Giordenello v. United States, 357 U.S. 480, 486 (1958); Brinegar v. United States, 338 U.S. 160, 175-176 (1949); Trupiano v. United States, 334 U.S. 699, 709-710 (1948); Johnson v. United States, 333 U.S. 10, 13-15 (1948); United States v. Di Re, 332 U.S. 581, 593-595 (1948); Carroll v. United States, 267 U.S. 132, 156 (1925); Director General v. Kastenbaum, 263 U.S. 25, 28 (1923); Stacey v. Emery, 97 U.S. 642-645 (1878); Ex Parte Burford, 3 Cranch 448 (1806); see also the historical information including quotations from James Otis; the Virginia Declaration of Rights and the Maryland Declaration of Rights as well as citation to North Carolina Declaration of Rights--Act II, Pennsylvania Constitution--Act 10, Massachusetts Constitution--Pt. I, Art. 14, in Henry v. United States, supra at 100-101.

characterizations of what likely occurs during a vast majority of constitutionally proper arrests, and the rest are simple over-statements of the police interest in avidly pursuing an investigation when the probable cause standard would appropriately slow it in order to protect the innocent.

Moreover, the justifications relied on by New York to exempt investigatory detentions from the probable cause requirement too easily lend themselves to distortion and dilution. Petitioner's case is a good example. In Morales, the New York Court of Appeals gave assurances that investigatory detentions absent probable cause would be permitted only when "all other investigatory techniques ... had been exhausted," 42 N.Y. at 136. And that court twice relied on the asserted fact that Morales could have left the police station whenever he desired. 22 N.Y. 2d 55, at 62; 42 N.Y. 2d 129 at 133. But here the New York courts disregarded these requirements. The detectives had substantial leads to

two other persons which they could have pursued before taking petitioner into custody, and it is conceded that petitioner was not free to leave. The fact that the New York courts permitted Dunaway's detention under these circumstances illustrates the unmanageability of the Morales standard. It also demonstrates the virtues of the bright-line test afforded by present Fourth Amendment doctrine, which treats all forcible custodial detentions as "seizures" requiring probable cause.

Adoption by this Court of a sliding scale standard for Fourth Amendment issues, to be adjusted in the first instance by state courts, will "only produce more slide than scale." Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349, 394 (1974). This Court will be required to rewrite existing Fourth Amendment doctrine in exhaustive--and exhausting--detail.[5/] Thus, considerations of judicial

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5/ One of the more obvious, inescapable side-effects of ruling that a custodial interrogation may be based upon less than probable cause is the possibility that the immunity police officers now

(Footnote 5 continued on next page)

economy, as well as individual liberty, also support rejection of New York's approach. Defining "reasonable suspicion", "brief" detentions, "carefully controlled circumstances", and crimes which are "brutal and heinous"-- and balancing all these considerations against intrusions on individual liberty in particular cases--would be a major new undertaking for the Court. Adopting New York's approach would require that it be done.

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enjoy from civil suits for false imprisonment and malicious prosecution would have to be expanded. Cases which refer to this immunity under present probable cause doctrine include, Stacey v. Emery, 97 U.S. 643, 644 (1878); Director General v. Kastenbaum, 263 U.S. 26 (1923); Henry v. United States, 361 U.S. 98, 102 (1959); Carroll v. United States, 267 U.S. 132, 155 (1925); Terry v. Ohio, 392 U.S. 1, 22 (1968); Pierson v. Ray, 386 U.S. 547, 555 (1967); Wood v. Strickland, 420 U.S. 308, 317 (1975).

II. INCULPATORY EVIDENCE OBTAINED AS THE RESULT OF THE UNCONSTITUTIONAL SEIZURE IN THIS CASE IS TAINTED AND MUST BE SUPPRESSED.

Three of the five justices of the Appellate Division ruled that even if the seizure of Dunaway had been improper, his statements and sketches would have been admissible because they were not tainted by the seizure. (A-9). People v. Dunaway, supra, at 303. This ruling is erroneous under the holdings of this Court in Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, supra, at 603-604; and Davis v. Mississippi, supra.

Here, as in Brown, there were no intervening circumstances, aside from Miranda warnings, which could have dissipated the effect of the illegal detention. Here, as in Brown, the seizure itself was coercive and was undertaken for the specific purpose of eliciting inculpatory statements. As the trial court succinctly stated on remand:

> Since the Miranda warnings by themselves did not purge the taint of the defendant's illegal seizure, Brown v. Illinois,

> supra, and there was no claim or showing by the people of any attenuation of the defendant's illegal detention, People v. Martinez, [37 N.Y. 2d 662], the defendant's statements and sketches are inadmissible. (A-24). (emphasis added).

Here, as in Brown, the defendant's statements must be suppressed.

Conclusion

The Judgment entered below should be reversed.

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